NO. 47749-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IRON GATE PARTNERS 5, L.L.C.,

Appellant

v.

TAPIO CONSTRUCTION, INC. and R.T. WHARTON ASSOCIATES, INC.,

Respondents

RESPONDENT'S BRIEF

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I. INTRODUCTION

This breach of contract case involves a project owner that chose not to hire a general contractor to coordinate and oversee all of the various specialty contractors it retained to work on a large commercial construction project. That owner now seeks to impose a strict liability warranty on one specialty contractor, as though it had assumed a general contractor's role. In the proceedings below, the owner did not prove breach by the specialty contractor or that the damages complained of were more probably than not actually caused by the specialty contractor's work. Indeed, the project owner's argument was, and remains, that it had no obligation to present such proof. The trial court correctly rejected the owner's assertions as to the breadth of the parties' contract, both on summary judgment, on motions in limine, and on the owner's motion for directed verdict. It correctly allowed the jury to decide factual questions relating to the parties' intent as expressed in their contract, and the causation issue. The trial court's rulings were correct and should be summarily affirmed.

This case involves construction of a mini-storage facility in Vancouver, Washington known as the "Mill Plain" facility. Appellant Iron Gate Partners 5, LLC ("Iron Gate") acted as the owner-builder-developer of that facility. Respondent Tapio Construction, Inc. ("Tapio"),

is a contractor specializing in excavation and concrete work. Iron Gate had hired Tapio on several prior mini-storage projects before the Mill Plain project without incident.

Tapio's scope of work for the Mill Plain project included excavation and concrete work similar to that which Tapio had performed for Iron Gate on prior projects. Contrary to Iron Gate's assertion, the scope of work did not involve any design services. The only waterproofing work called for under Tapio's scope of work was for portions of two sub-grade retaining walls. No waterproofing by Tapio was called out, in the plans and specifications, or in the contract documents, in other areas where Tapio installed concrete work. Nor was Tapio required to waterproof other areas of the project where it did not install concrete.

The heart of the parties' dispute is a warranty provision in their Master Contract. The Master Contract was drafted by Iron Gate. It was substantially the same contract that Iron Gate used for all other trades it hired to work on the project. The warranty did not include any "absolute guarantee against any water intrusion," as Iron Gate contends. Indeed, the general warranty language does not even mention water intrusion. Rather, the contract simply provides that Tapio warranted the satisfactory performance of its work – that is, the work detailed in the scope of work attached to the parties' contract – for a period of one year from completion

of the project. As the contract's terms make clear, Tapio did not warrant the project's design, nor did it warrant the work of other trades.

The project was completed in approximately August-September 2007. There was substantial evidence that Iron Gate did not bring any performance issues with Tapio's work to Tapio's attention until April 2009, well over the one-year warranty period had expired. Likewise, although Iron Gate contends that it discovered water intrusion into some of the facility's storage units, substantial evidence was presented in the trial court that Tapio's work was not the cause or source of that water intrusion. Indeed, in the proceedings below, Iron Gate sued not only Tapio, but also R.T. Wharton and Associates, the structural engineer for the project, alleging that either or both of them were responsible for the water intrusion.

Iron Gate's case against Tapio failed in the trial court because it rested on the overly simplistic premise that, because water had allegedly penetrated through concrete that Tapio constructed, Tapio's work under the contract was necessarily failing to satisfactorily perform. The trial court and jury below correctly rejected Iron Gate's breach of contract claims against Tapio based on evidence that the contractual warranty was not nearly as broad as Iron Gate contended, and that the water intrusion could be explained by numerous other causes that had nothing to do with

the performance of Tapio's work. In short, Iron Gate did not carry its burden of proving that Tapio's breach of the contractual warranty provision caused Iron Gate's damages.

The parties' contract also had a prevailing party attorney's fee clause. The trial court correctly awarded attorney's fees to Tapio as the prevailing party, and rejected Iron Gate's overly technical argument that Tapio was not entitled to a fee award because it had contracted with an insurer to defend him against Iron Gate's claims.

The trial court's rulings should be affirmed in all respects.

II. COUNTERSTATEMENT OF THE ISSUES

Issue No. 1: Did the trial court correctly allow the jury to decide issues relating to the parties' intent with respect to the contractual warranty provision?

Issue No. 2: Did the trial court correctly allow the jury to decide whether the evidence supported Iron Gate's assertion that the water intrusion issues were caused by Tapio's work?

Issue No. 3: Did substantial evidence support the jury's verdict in favor of Tapio?

Issue No. 4: Did the trial court correctly award Tapio prevailing party attorney's fees, where the contract expressly provided for such fees, and Tapio purchased liability insurance to cover its attorney's fees?

III. COUNTERSTATEMENT OF THE CASE[1]

Iron Gate makes several unsupported assertions in its statement of the facts, as well as in the argument portion of its brief. Tapio endeavors to provide correction, and further context, here.

A. TAPIO WORKED SUCCESSFULLY WITH IRON GATE ON SEVERAL PRIOR MINI STORAGE PROJECTS

Tapio is a contractor that specializes in concrete and excavation work. (RP, Vol. VIII, 5/1/14, p. 916) The mini-storage project involved in the underlying lawsuit was known as the "Mill Plain" facility. (CP 23) Prior to this project, Iron Gate's owner had hired Tapio on three other mini-storage construction projects. (RP, Vol. VIII, 5/1/14, pp. 921, 923-24, 931-953; RP, Vol. 2, 4/15/14, p. 346) Iron Gate's construction consultant and on-site representative for the Mill Plain project, Bob Pinder, had also worked on those three projects, and had developed a good working relationship with Tapio. (RP, Vol. 8A, 4/24/14, pp. 2027-2028, 2048, 2053, 2061.) Mr. Pinder testified that Tapio's work on the first two projects was "excellent." (RP, Vol. 8A, 4/24/14, pp. 2054, 2062-2063)

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[1] Appellant Iron Gate and Respondent Tapio filed separate Statements of Arrangements for different transcripts from the proceedings below. Unfortunately, the transcripts are not consecutively numbered. The transcripts ordered by Iron Gate are numbered with Arabic numerals, and the transcripts ordered by Tapio are numbered with Roman numerals. To assist the court in locating the record citations, below and throughout this brief, citations to the Record of Proceedings (RP) include the RP page numbers, volume number, and date of the proceedings in issue.

Because of this past working history, Iron Gate had a very good relationship with Tapio, and thus "a lot of faith" in Tapio's work. (RP, Vol. 8A, 4/24/14, pp. 269-270) Indeed, Iron Gate did not solicit bids for the work Tapio performed on the project from any other contractors. (RP, Vol. 9B, 4/28/14, p. 2571)

B. TAPIO'S CONTRACT WITH IRON GATE WAS FOR A LIMITED SCOPE OF WORK

Iron Gate hired Tapio to work on the Mill Plain project under a "Master Contract." This Master Contract was drafted by Iron Gate's principals, Glen Aronson and Rick Lennon. (RP, Vol. 2, 4/15/14, pp. 302; 244; CP 48-60 at 57-58, Trial Ex. 91). This was substantially the same contract that Iron Gate entered into with other contractors on the site. (RP, Vol. 2, 4/15/14, p. 389) Only the scope of work was negotiated and specific to each contractor.

Iron Gate's description of Tapio's scope of work under the contract is misleading. Tapio was not hired as the general contractor for the project. Rather, consistent with its specialization in concrete and excavation work, Tapio's scope of work on the Mill Plain work was generally limited to grading, excavation and concrete work. (CP 48-60 at 57-58; Trial Ex. 91)

This scope of work, sometimes referred to by Iron Gate as the Work (with a capital W), is clearly defined. It lists discrete tasks that

Tapio was hired to perform, all regarding excavation and concrete work. Each task is expressly and separately priced. (CP 48-60 at 57-58; Trial Ex. 91)

The scope of work makes clear that Iron Gate hired others to perform the design of the project, listing the plans provided to Tapio and the entities involved in creating them.[2] (CP 48-60 at 58, ¶¶ 2.1-2.4; Trial Ex. 91) The scope of work speaks clearly, and does not include design work, supervision work, or the duties or a general contractor. (CP 48-60 at 58, ¶¶ 2.1-2.4; Trial Ex. 91) Iron Gate's owner Patrick Lennon testified that Tapio's contract did not require it to supervise the work of others at the site. (RP, Vol. 9B, 4/28/14, p. 2548)

Iron Gate's claims against Tapio involve post-construction water intrusion issues at the facility. Although Iron Gate repeatedly argues that Tapio contracted to build a water-tight facility, the parties' contract does not support this assertion. Tapio's scope of work involves only one reference to waterproofing, and that is in the scope of work attached to the Master Contract. That scope of work provides, in pertinent part:

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[2] Iron Gate contracted with R.T. Wharton as its structural design engineer on the Mill Plain project. (RP, Vol. 2, 4/15/14, pp. 277, 348, 395) Wharton was primarily responsible for the project's design. (RP, Vol. 2, 4/15/14, p. 278) Iron Gate also hired an architect, but had to retain a new architect part way through the project when the first architect died. (RP, Vol. 2, 4/15/14, p. 434)

Item 1. Scope of Work

> 1.3 Retaining wall package to include:
> Footing excavation and compaction. Labor and materials to form concrete footings and walls. Furnish and install rebar package. Concrete pumping, concrete, place and finish. Furnish and install ecoline-r liquid applied membrane waterproofing and "**miradrain system**" with perforated drain pipe on building "A&B" retaining walls before back filling. All property line retaining walls as required with grade on adjacent properties shall be returned to original condition.

(CP 57; underlining emphasis added; bold emphasis in original; Trial Ex. 91) No other waterproofing work was called for under the contract. Iron Gate's consultant, Bob Pinder, testified that that concrete apron on the drive aisle (the second floor slab) was not to be waterproofed under the project's plans and specifications. (RP, Vol. 8A, 4/24/14, p. 2093)

Tapio's project manager, Tim Yarnot, testified that that Tapio generally does not perform waterproofing work, which is considered specialty work. (RP, Vol. 2, 4/15/14, p. 270) Tapio is a concrete specialist, but not a waterproofing specialist. (RP, Vol. 2, 4/15/14, p. 270) Accordingly, Tapio subcontracted the waterproofing work to A&A Contracting. (RP, Vol. IX, 5/1/14, p. 975)

C. THE CONTRACT'S WARRANTY PROVISION WAS LIMITED TO, AND LIMITED BY, TAPIO'S SCOPE OF WORK

As discussed above, the Master Contract to which Tapio's scope of work was attached was drafted by Iron Gate. The form contract provides in pertinent part:

> **SECTION 15. WARRANTY**
>
> Contractor warrants to Owner that all materials and equipment furnished shall be new unless otherwise specified and that all workmanship under this Agreement shall be of good quality, free from faults and defects and in conformance with the Contract Documents and with standards as approved by governing building authorities. Contractor warrants and guarantees to Owner (i) the satisfactory performance of the Work for period of one year from _____, the date of Completion and (ii) the work, labor and materials installed in the building indicated above have been done in accordance with the Contract Documents. Contractor agrees to repair or replace any or all Work, together with any other adjacent work, which may be displaced by so doing, to Owner's satisfaction, that (i) fails to perform for one (1) year from the date of Completion or (ii) proves to be nonconforming or defective in its workmanship or materials within period of two (2) years from the date of Substantial Completion, without any expense whatsoever to Owner, ordinary wear and tear and unusual abuse or neglect excepted.

(CP 54-55; underlining emphasis added; Trial Ex. 91)

Iron Gate entered into the same basic contract with each trade working on the job. (RP, Vol. 2, 4/15/14, 389-390) As a result, the warranty language quoted above is not specific to Tapio, but instead

simply references the "Work" called for under the contract. As set forth in Section 1 of the Master Contract, the "Work" that is the subject of the agreement is specified on Addendum A. (CP 48-60 at 57-58; Trial Ex. 91) Addendum A describes Tapio's scope of work. Iron Gate's Patrick Lennon testified as to his understanding that, under the contract, Tapio was not guaranteeing the performance of the entire building. (RP, Vol. 9B, 4/28/14, pp. 2592-2593) Accordingly, the contract's warranty provisions are limited to, and limited by, Tapio's scope of work.

D. BY DECLINING TO HIRE A GENERAL CONTRACTOR, IRON GATE ASSUMED A GENERAL CONTRACTOR'S DUTIES AND RESPONSIBILITIES ITSELF

Iron Gate chose not to retain a general contractor to assume responsibility for hiring, overseeing, coordinating and managing all the various specialty contractors working on the site. Rather, Iron Gate performed these tasks itself. (RP, Vol. III, 4/29/14, pp. 239; RP, Vol. IV, 4/29/14, pp. 269, 420, 425-427; RP, Vol. 8A, 4/24/14, pp. 2090, 2092-2093, 2110-2111; RP, Vol. 9B, 4/28/14, p. 2563) Iron Gate owner, Glen Aronson, testified that he hired all the contractors on the project, negotiated their prices, hired and worked with engineers, architects and consultants, worked with the city, and generally did "just everything that it took to put a project together." (RP, Vol. 2, 4/15/14, pp. 270-271) Iron

Gate also managed the permitting process through its agent, Bob Pinder. (RP, Vol. 8A, 4/24/14, pp. 2103-2104)

Mr. Aronson, who lives in California, testified he was on site about seven to ten days monthly during construction. (RP, Vol. 2, 4/15/14, pp. 266, 271) During his absence, Iron Gate used two different site supervisors, which it referred to as "consultants," during the course of construction: Bob Pinder and John McCormick. (RP Vol. 2, 4/15/14, pp. 346) Iron Gate had no representative on site who coordinated or restricted access to the building while it was under construction. (RP Vol. 2, 4/15/14, pp. 444) However, Bob Pinder did have a roll in telling Tapio when it could return to the job site to continue work.[3] (RP, Vol. IX, 5/1/14, pp. 978-980) John Tapio testified that, from his perspective, Mr. McCormick was in charge of the project, and acted as a project superintendent, while Mr. Pinder served more in the capacity as a project manager. (RP, Vol. VIII, 5/1/14, p. 957-958)

The testimony presented at trial regarding Mr. Pinder and Mr. McCormick illustrates their rolls as de facto project managers/superintendents for Iron Gate. Both Mr. Pinder and Mr. McCormick are licensed engineers. (RP, Vol. 2, 4/15/14, pp. 272, 275)

[3] Tapio's work on the project was completed on or about July 30, 2007. (CP 43) The project itself was substantially completed later, in late summer (August-September) 2007. (RP, Vol. 2, 4/15/14, pp. 281, 397-398; CP 43-44)

Mr. Aronson testified that Mr. Pinder helped negotiate the contract with Tapio, and that for most of the project Mr. McCormick oversaw the contractors, took photos, and kept Mr. Aronson updated on what was going on with the construction (RP, Vol. 2, 4/15/14, pp. 273, 275-276) Mr. McCormick sent Mr. Aronson inspection reports on a consistent basis, and both Mr. Pinder and Mr. McCormick sent him weekly job reports. (RP, Vol. 2, 4/15/14, pp. 431-432; RP, Vol. 3A, 4/15/14, pp. 475-479) Only Mr. Aronson had authority to make or approve change orders. (RP, Vol. 2, 4/15/14, pp. 437) If a contractor, such as Tapio, had questions, those questions would be presented to Mr. McCormick, who then called Mr. Aronson for the answer. RP, Vol. 2, 4/15/14, pp. 347-348) John Tapio testified that he had constant communications with Mr. Pinder. (RP, Vol. IX, 5/1/14, pp. 979-980) When Mr. McCormick became ill toward the end of the project, Mr. Pinder took over and assisted with finishing the project. (RP, Vol. 2, 4/15/14, pp. 276-277)

Mr. Aronson testified that he considered Tapio to be a "general contractor" on this job not by virtue of the parties' contract, or due to the negotiated scope of work, but simply because Tapio holds a general contractor's license. (RP, Vol. 2, 4/15/14, p. 347) Mr. Aronson stated that he felt that any contractor with a general contractor's license working on the job was a general contractor for the job, and that there may have been

more than one general contractor on this project. (RP, Vol. 2, 4/15/14, p. 347) However, Iron Gate's Patrick Lennon testified that Tapio did not perform the role of general contractor; rather, it performed the role of a contractor. (RP, Vol. 9B, 4/28/14, p. 2564) Indeed, Mr. Lennon identified numerous other contractors on the project besides Tapio, including a metal contractor, a plumbing contractor, an electrical contractor, a heating contractor and a masonry contractor. (RP, Vol. 9B, 4/28/14, pp. 2584-2586) Iron Gate's assertion that Tapio was "the" general contractor for the project is without basis, as shown by Iron Gate's own testimony.

E. TAPIO WAS FIRST ADVISED OF THE WATER INTRUSION ISSUES IN APRIL 2009

Mr. Aronson testified that he first became aware of water intrusion issues three or four months after completion of the project. (RP, Vol. 2, 4/15/14, p. 354) He did not think much of it at first, because he had experienced something similar on prior projects. (RP, Vol. 2, 4/15/14, pp. 354-355) He thought the cause of the water intrusion might be power washing, as Iron Gate had power washed the entire facility after construction was complete. (RP, Vol. 2, 4/15/14, p. 356, 359) Mr. Aronson conceded he does not know if the water he saw at that time was from power washing, water from construction, or water intruding through the walls. (RP, Vol. 2, 4/15/14, pp. 356-357)

Patrick Lennon also testified that he became aware of water intrusion in about November 2007. (RP, Vol. 9A, 4/28/14, pp. 2386-2388; Vol. 9B, 4/28/14, p. 2625) He testified he discussed the issue at that time with Dave Ross. (RP, Vol. 9B, 4/28/14, pp. 2625-2626) However, Mr. Ross testified that between discovery of the intrusion and the first tenant complaints in April 2009, he only communicated with Mr. Wilson[4] about the water intrusion, and not with either Mr. Lennon or Mr. Aronson. (RP, Vol. 3A, 4/16/14, pp 504-505, 529-530)

In April 2009, a tenant complained to Iron Gate about water intrusion issues. (RP, Vol. 2, 4/15/14, p. 381) Mr. Aronson testified he did not contact Tapio until after this complaint was made – nearly two years after the completion of the job. (RP, Vol. 2, 4/15/14, pp. 382, 412-413; CP 43) In making that initial contact, Mr. Aronson told Tapio he thought the problem was related to drainage (i.e., not concrete work). (RP, Vol. 2, 4/15/14, pp. 375)

Mr. Lennon testified that he contacted Tim Yarnot of Tapio in approximately March of 2008 about the water intrusion issue. (RP, Vol. 9B, 4/28/14, pp. 2627-2628) However, Mr. Yarnot testified his first

[4] Curtis Wilson is the district manager for the Iron Gate facilities. (RP, Vol. 2, 4/15/14, p. 284).

contact with Mr. Lennon on the water intrusion issue was in September 2009. (RP, Vol. 10B, 4/29/14, pp. 2843-2844)

Accordingly, the trial testimony was conflicting as to when Tapio was first informed of the water intrusion issues. As such, substantial evidence was presented at trial that Iron Gate was aware of water intrusion issues for some time before notifying Tapio, but chose to ignore them.

F. THE EVIDENCE IDENTIFIED SEVERAL POTENTIAL SOURCES OF WATER INTRUSION THAT DID NOT INVOLVE TAPIO'S WORK

Although Iron Gate asserted that there was significant water intrusion and standing water noted during the one-year warranty period, it made no record of it. (RP, Vol. 2, 4/15/14, pp. 367-368) It did not take photos, notify tenants in writing or record any statements from tenants. (RP, Vol. 2, 4/15/14, pp. 362-364, 367-368)

1. IRON GATE'S EXPERTS DID NOT ESTABLISH THAT NON-PERFORMANCE OF TAPIO'S WORK WAS THE CAUSE OF WATER INTRUSION

Iron Gate did not present any evidence actually showing that Tapio's work is the cause of water intrusion at the site, as opposed to other possible causes. Iron Gate's experts investigating water intrusion, Mr. Bauer and Mr. Cross, testified that they did not make any effort to isolate individual conditions that could be the source of water intrusion when testing at the site. (RP, Vol. 4B, 4/17/14, pp. 966, 1004-1005; RP, Vol.

6A, 4/22/14, pp. 1469-1476) Iron Gate's experts also did not endeavor to eliminate non-construction defect causes of alleged damage.

For example, Iron Gate asserted that concrete spalling[5] shows that Tapio's work is defective and the cause of water intrusion. (RP, Vol. 6A, 4/22/14, p. 1490). However, Iron Gate's expert, Mr. Cross, testified that there were multiple possible causes for concrete spalling, and they made no effort to rule out other causes. (RP, Vol. 6A, 4/22/14, pp. 1490-1491, 1542; *see also* RP, Vol. 5A, 4/21/14, pp. 1160-1161) Mr. Cross also testified that he could not say that damage to the concrete at the project was actually caused by Tapio's work. (RP, Vol. 6A, 4/22/14, p.1490)

Iron Gate's expert Justin Franklin affirmatively testified that the level of vertical cracking in the concrete is related to the placement of the rebar in the concrete wall. (RP, Vol. 5A, 4/21/14, pp. 1143-1145; 1152-1153) Rebar was placed by Kiwi Construction, another contractor on the project, and was not a part of Tapio's scope of work. (RP, Vol. 2, 4/15/21, p. 279) Mr. Franklin also testified that the rebar was placed according to the plans, but the plans themselves do not meet the applicable building code. (RP, Vol. 5A, 4/21/14, pp. 1149-1150) Further, Mr. Franklin testified that these types of errors could not be spotted by a concrete

[5] The term "spalling" refers to cracking or breaking of concrete. (RP, Vol. 6A, 4/22/14, pp. 1338-1339)

contractor, and would require the expertise of an engineer to spot. (RP, Vol. 5B, 4/21/14, p. 1201)

Mr. Franklin also testified regarding defects in Kiwi Construction's installation of the pan deck.[6] Mr. Franklin testified that the plans showed two different installations for the pan deck: one showing the edge of the pan decking terminating directly at the concrete wall, with the lip of the decking turning up just inside the concrete wall, and the other showing the pan decking terminating over rebar at the edge of the concrete wall, leaving rebar exposed to weather. (RP, Vol. 5A, 4/21/14, pp. 1165-1169) Mr. Franklin testified that only the first installation method was proper. (RP, Vol. 5A, 4/21/14, p. 1169) However, Kiwi did not install the pan deck according to either detail. Instead, Kiwi terminated the pan flush with the outside of the wall, without covering the rebar. (RP, Vol. 5A, 4/21/14, p. 1170)

Mr. Franklin testified that the inadequate re-bar and improper installation of the pan deck at the construction joint affected the shear connection in the building. (RP, Vol. 5B, 4/21/14, p. 1200) Mr. Franklin testified that "shear is essentially the sliding of ... two forces across each

[6] The deck pan, also referred to as a pan deck, is a piece of steel shaped like a pan – rectangular with raised sides, that has a ribbed profile. Concrete is poured into the pan, which serves as a framework for the concrete pour, but also reinforces the concrete slab. *See* http://www.metaldeckdirect.com/index_FloorDeck.htm

other." (RP, Vol. 5B, 4/21/14, p. 1200) In this case, Mr. Franklin testified that "we're mainly concerned with the shear forces that exist between that -- that construction joint. So the -- the -- the rebar dowels are there to -- to resolve those shear forces and -- and -- and make sure that you've established an adequate connection between those two components of the building." (RP, Vol. 5B, 4/21/14, p. 1200) He testified that this major construction issue was caused by the inadequate plans and specifications and the installation work performed by Kiwi. (RP, Vol. 5B, 4/21/14, p. 1200) Further, Mr. Franklin testified that this error could not be spotted by a concrete contractor, and would require the expertise of an engineer to spot. (RP, Vol. 5B, 4/21/14, p. 1201)

Additionally, Iron Gate's expert Mr. Cross testified that the standard they used when opining that Tapio's work was defective or non-performing was simply whether water entered the building or not – there was no care taken to determine which contractor's work or what specific work or condition might be the cause. (RP, Vol. 5C, 4/21/14, pp. 1360-1361)[7]

[7] Even Mr. Aronson identified another cause of the alleged defects: the design by structural engineer R.T. Wharton. (CP 26-27; RP, Vol. 2, 4/15/14, pp. 349-350)

2. TAPIO PRESENTED EVIDENCE OF OTHER CAUSES OF WATER INTRUSION

At trial, Tapio presented evidence that other aspects of the project that were not within its scope of work presented possible entry points for water intrusion. For example, Iron Gate did not hire Tapio, or any other contractor, to caulk exterior cold joints. (RP, Vol. 2, 4/15/14, pp. 379-381) John Tapio testified that, before the project started, he gave Mr. Aronson a figure for caulking between the drive aisle and the second floor apron, but Mr. Aronson said the figure was too high and that he would caulk it himself. (RP, Vol. IX, 5/1/14, p. 997) Tapio's project manager, Tim Yarnot, noticed that caulking had not been performed when he visited the site in 2009, and told Mr. Aronson that caulking the joints between the drive aisle and the apron was something to be considered. (RP, Vol. 10B, 4/29/14, pp. 2851-2852)

Mr. Aronson testified that, after the project was done, he asked Tapio about the caulking, because he thought Tapio should have done it. (RP, Vol. 2, 4/15/14, pp. 380-381) After Tapio told him it was not part of Tapio's contract, he asked his own crew to do the work. (RP, Vol. 2, 4/15/14, pp. 380-381) Mr. Aronson could not say when he directed that this work be done, but asserted that the caulking of the interior floors was completed by May 2009. (RP, Vol. 2, 4/15/14, pp. 382, 385) However, the

caulking work was of poor quality, and Iron Gate hired Pioneer Waterproofing to re-do the caulking after Tapio performed a dyed water test. (RP, Vol. 2, 4/15/14, pp. 379-380) After the re-caulking was done, the water intrusion slowed down. (RP, Vol. 2, 4/15/14, pp. 386-387)

Iron Gate has also criticized the lack of a water stop at the cold joint. However, no water stop was included on the plans for this cold joint, nor called out in Tapio's scope of work. (RP, Vol. VII, 4/30/14, pp. 700-703; pp. 745-746) Water intruding through the cold joint does not implicate Tapio's work.

John Tapio described several incidents where he observed other trades causing damage to Tapio's work. Although John Tapio raised his concerns with Iron Gate, they were not addressed.

John Tapio testified that there was a damage issue caused by the forming of the pan deck, which was installed by Kiwi Construction, on site. (RP, Vol. IX, 5/1/14, pp. 985-986) John Tapio was on site after the drain mat was installed to work on the managers' quarters in a separate area. (RP, Vol. IX, 5/1/14, p. 986) At that time, he saw that the pan deck was loaded on forks into the driveway aisle such that the pan was puncturing the drain mat. (RP, Vol. IX, 5/1/14, p. 986) John Tapio informed Paul Holmes of Kiwi Construction. (RP, Vol. IX, 5/1/14, p. 986) He also informed Bob Pinder. (RP Vol. IX, 5/1/14, p. 986). Mr. Pinder

asked if Tapio could repair the mat, and Tapio put a patch of new drain mat over the wound, spanning two feet to either side of the damaged area. (RP, Vol. IX, 5/1/14, p. 986) Shortly thereafter, there was a second incident where John Tapio observed the same condition and damage, which he reported to Paul Holmes and John McCormick. (RP, Vol. IX, 5/1/14, p. 986)

John Tapio also testified to a third incident where he observed damage to the drain mat after it had already been installed. He had come to the job site, and, while there, he observed a long strip of drain mat that had been cut back and pulled away. (RP, Vol. IX, 5/1/14, p. 987) He spoke to Paul Holmes and asked what they were doing. (RP, Vol. IX, 5/1/14, p. 987) Mr. Holmes told John Tapio that he had to work in that area. (RP, Vol. IX, 5/1/14, p. 987) Mr. Tapio noted that there were metal shavings in the area and told Paul Holmes that he (Mr. Holmes) was dumping debris, including screws, into the drain mat area. (RP, Vol. IX, 5/1/14, pp. 987-988) John Tapio told Paul Holmes that it was important to remove any debris and that there should be none in that area. (RP, Vol. IX, 5/1/14, pp. 987-988) He also told John McCormick about the issue. (RP, Vol. IX, 5/1/14, p. 988)

The next time John Tapio went out to the site, he saw that someone had leaned pallets up against the drain mat to push it into the

retaining wall, rather than reattaching it. (RP, Vol. IX, 5/1/14, p. 989) John Tapio testified that if work had been performed in the order he preferred, allowing the concrete for the drive aisle to be poured immediately after the pan deck concrete was poured, the drain mat would have been fully protected. (RP, Vol. IX, 5/1/14, pp. 990-991)

3. TAPIO'S WATERPROOFING INSTALLATION COMPLIED WITH THE PLANS AND MANUFACTURER GUIDELINES

Tapio's subcontractor, A&A Contracting, applied a liquid membrane to the retaining walls, as called for in the Scope of Work. (RP, Vol. IX, 5/1/14, p. 975) After the membrane was installed, John Tapio went out to inspect the work, and confirmed that the membrane was dry and tight on the wall. (RP, Vol. IX, 5/1/14, p. 975-976) He also confirmed that the footings were fully coated. (RP, Vol. IX, 5/1/14, p. 976)

Iron Gate contended that the membrane was defectively installed because its thickness was 40 to 45 milliliters ("mil") at its thinnest point. (RP, Vol. VII, 4/30/14, p. 729) However, Tapio presented evidence that the manufacturer warrants the product at 40 mil thickness. (RP, Vol. VII, 4/30/14, p. 729)

Iron Gate did not present evidence showing that the membrane had actually failed. Iron Gate's experts saw no evidence that the membrane was not spanning, or covering, the cracks that existed in the concrete. (RP,

Vol. 5B, 4/21/14, p. 1197; RP, Vol. 6A, 4/22/14, p. 1514) Mr. Bauer, who performed the majority of the expert testing for Iron Gate, testified that he did not observe any cracks in the membrane. (RP, Vol. 4B, 4/17/14, pp. 970-971)

Iron Gate also criticized Tapio's installation of the drain mat. Iron Gate asserted that the drain mat was defectively installed because it was "shot pinned".[8] (RP, Vol. VI, 4/30/14, p. 738) However, Tapio presented evidence that this technique was approved by the manufacturer and included in its literature. (RP, Vol. VI, 4/30/14, pp. 738-739)

Iron Gate asserted the membrane was improperly installed because a termination bar was not used, and that this was in conflict with the manufacturer's installation instructions.[9] (RP, Vol. VII, 4/30/14, p. 741) While the instructions recommend additional materials as a termination bar, the recommended materials are not required by the manufacturer, and were not called out on the plans and specifications. (RP, Vol. VII, 4/30/14, pp. 741-742) Further, Iron Gate made the specific choice not to use a termination bar, due to cost concerns. (RP, Vol. IX, 5/1/15, pp. 980-981)

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[8] "Shot pinning" is a fastening process where fasteners are shot into material through a quick burst of pressure, similar to using a nail gun. (RP, Vol. 6B, 4/22/15, pp. 1668-1669; RP Vol. 8A, 4/24/15, pp. 2156)

[9] A termination bar is a strip of stiff plastic with pre-drilled holes, spaced evenly along the strip for installation. A termination bar can be used in the attachment and installation of vertical membrane systems.
http://www.wrmeadows.com/termination-bar/

Iron Gate also raised the distinction between damp proofing and waterproofing. (RP, Vol. IX, 5/1/14, p. 1019) Waterproofing is more moisture resistant than damp proofing. (RP, Vol. IX, 5/1/14, pp. 1019-1020) Iron Gate implied that Tapio only damp-proofed its work at the project, but John Tapio testified that Tapio applied a waterproof membrane. (RP, Vol. IX, 5/1/14, p. 1022) This was confirmed by Tapio's expert, Michael Milakovich, and the product manufacturer. (RP, Vol. VIII, 5/1/14, pp. 813-815, 908) A damp-proof application of the membrane would be a thickness of only 10 mil. (RP, Vol. VIII, 5/1/14, p. 908.) However, the membrane was applied at a thickness of 40 to 45 mil at its thinnest point. (RP, Vol. VII, 4/30/14, p. 729) The membrane was installed in a waterproofing application.

4. TESTIMONY AND TESTING BY TAPIO AND ITS EXPERTS ESTABLISHED THAT NON-PERFORMANCE OF TAPIO'S WORK WAS NOT THE CAUSE OF THE WATER INTRUSION

Iron Gate asserts that Tapio's expert, Michael Milakovich, testified that water was intruding through Tapio's concrete work. (Opening Brief, p. 9) Iron Gate's summary of Mr. Milakovich's testimony on this point is incorrect. Mr. Milakovich testified that a single possible source for water intrusion could not be identified based on the testing performed. (RP, Vol. VII, 4/30/14, pp. 714-715) Rather, he identified multiple possible entry points. These include sealant joints, poorly sealed metal enclosures, and

cracks in the interior of the construction. (RP, Vol. VII, 4/30/14, pp. 714-715) He also testified that a strong candidate for the cause of water intrusion was the unwaterproofed cold joint at the intersection of the floor slab and the retaining wall.[10] (RP, Vol. VII, 4/30/14, pp. 699-700)

As part of his investigation into the water intrusion issues, Mr. Milakovich and his team sprayed water at the base of one of the unit doors for 15 minutes. (RP, Vol. VII, 4/30/14, pp. 698-699) When this did not produce a result, they sprayed water at the door jamb. (RP, Vol. VII, 4/30/14, pp. 698-699) Spraying the door jamb showed some water intrusion, which came out of the lap in the deck pan. (RP, Vol. VII, 4/30/14, p. 699) Water streamed down the wall at the lap in the pan deck located at the partition wall. (RP, Vol. VII, 4/30/14, p. 699) Mr. Milakovich also observed water coming out of the cold joint between the floor slab and the retaining wall. (RP, Vol. VII, 4/30/14, pp. 699-700) He testified that this is highly unusual because, where there is a retaining wall with free draining fill behind it - as is the case here - one would expect water to drain away through the fill. (RP, Vol. VII, 4/30/14, pp. 700-701) Water should not back up and pool if it is coming from outside the

[10] Tapio was contracted to apply waterproofing to the retaining wall only, and waterproofing the cold joint was not in Tapio's scope of work. (RP, Vol. VII, 4/30/14, pp. 745-746)

structure, because there would not be sufficient hydrostatic pressure to cause the back-up and pooling. (RP, Vol. VII, 4/30/14, p. 701)

Mr. Milakovich and his partners, including structural engineer David Sandahl, investigated possible causes for this unusual condition. They determined there was no water stop included on the plans for the cold joint, and the cold joint is not waterproofed as installed at this location[11]. (RP, Vol. VII, 4/30/14, pp. 700-703)

Testing was also performed by Tapio, at Iron Gate's request. Tapio performed a drain test with dyed water to test the drainage system. (RP, Vol. 2, 4/15/14, pp. 375-376) This test indicated other sources of water intrusion. During the dyed water test, John Tapio poured a gallon of water into a crack between the overhead door and the edge of the apron, and the crack was able to take in all the water.[12] (RP, Vol. IX, 5/1/14, pp. 1004-1008) John Tapio selected this site for testing because he believed that the pan deck was holding water like a reservoir, and periodically spilling over into the building units. (RP, Vol. IX, 5/1/14, pp. 1008-1009) Mr.

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[11] Tapio was contracted to apply waterproofing to the retaining wall only, and waterproofing the cold joint was not in Tapio's scope of work. (RP Vol. VII, 4/30/14, pp. 745-746)

[12] The dyed water did not come into the interior of the building during this testing. (RP Vol. 2, 4/15/14, pp. 376-377)

Milakovich also testified that it is possible for water to fill the pan deck in this manner. (RP, Vol. VIII, pp. 714-715)

Mr. Milakovich investigated the water intrusion by performing a RILEM tube test. (RP, Vol 6, 4/30/14, p. 679) The RILEM tubes are small, hollow tubes that are stuck on to the building components with strong putty, and then filled with five milliliters of colored water. (RP, Vol 6, 4/30/14, p. 679) This creates hydrostatic pressure, and allows the tester to try and force liquid through the building component in question. (RP, Vol 6, 4/30/14, p. 679) In this case, Mr. Milakovich was trying to force water through observable cracks in the concrete. (RP, Vol 6, 4/30/14, p. 679)

Mr. Milakovich first tested four locations with the RILEM tube test. (RP, Vol 6, 4/30/14, p. 680) He selected areas above the membrane where voids – or air bubbles – were known to exist in the membrane, and one area where the membrane was known to be thick and without voids, to use as a control. (RP, Vol 6, 4/30/14, pp. 680-682) The areas passed the testing. (RP, Vol. 6, 4/30/14, pp. 682-686)

Mr. Milakovich also performed a RILEM tube test above a lower-level unit that showed water draining along the exposed rebar between the pan deck and the retaining wall. (RP, Vol. 6, 4/30/14, pp. 687-688; RP, Vol. 7, 4/30/14, pp. 697-698) This is the only location where Mr.

Milakovich saw colored water during his RILEM testing. (RP, Vol. 6, 4/30/14, pp. 687-688; RP, Vol. 7, 4/30/14, pp. 697-698)

Mr. Milakovich opined that water was entering at vulnerable points in the building envelope above the slab and drain pan area (i.e., above the areas which involved Tapio's work), traveling through cracks in other parts of the construction, eventually building up and exiting at the only available point. (RP, Vol. VII, 4/30/14, pp. 703-704) He testified:

> So what makes the most sense now, after all the information has been gathered and talking with everybody, is that the water's coming in, you know, from the sources. We've got cracks in the drywall. We have -- do have an unwaterproofed cold joint, construction joint there. That is true. Water is coming in from the system up above and finding the cracks and it's coming all the way down to here. And then it can try to get out, but as Jeremy [Richardson] said, he put over 150 mils of material down there.
>
> I talked with Epro and they said even though it doesn't have reinforcing fabric, 150 mils is 150 mils. It's a lot of membrane. It's coming down the crack, tries to go up there, it can't. The only place is can come back up, and that's how it builds up a hydrostatic head is because there's membrane there. So it can build up a static head and then pushes itself back into the unit. That's what makes sense because water just coming down is either going to get caught by the drain or caught on the footing. And even if it gets caught on the footing, it will just sit there. Right? It will just sit in that cold joint. There's nothing to push it up. The only thing pushing it up is more water coming down, hitting the membrane, and being forced up -- then it fills up like a bathtub, and then gets pushed out with the

> hydrostatic pressure. That's what makes the most sense to me.

(RP, Vol. VII, 4/30/14, p. 703, l. 20 – p. 704, l. 21) In short, Mr. Milakovich's expert opinion identified work that was not performed by Tapio as the most likely cause of water intrusion.

Iron Gate presented no evidence showing that non-performance of Tapio's work, as opposed to any other possible cause, was the cause of any water intrusion at the project. (RP, Vol. 2, 4/15/14, pp. 349-350; RP Vol. 4B, 4/17/14, pp. 966, 1004-1005; RP, Vol. 5A, 4/21/14, pp. 1160-1161; RP, Vol. 5C, 4/21/14, pp. 1360-1361; RP, Vol. 6A, 4/22/14, pp. 1469-1476, 1490-1491.) By contrast, both Tapio and Iron Gate presented substantial evidence showing that work of Iron Gate, its employees, and other trades hired by Iron Gate were likely sources of water intrusion at the project. (*See* RP, Vol. VII, 4/30/14, pp. 703-704; RP, Vol. 2, 4/15/14, pp. 349-350)

IV. ARGUMENT

A. IRON GATE DID NOT ESTABLISH ITS BREACH OF CONTRACT CLAIM IN THE TRIAL COURT

1. THE TRIAL COURT PROPERLY INTERPRETED THE PARTIES' CONTRACT TO NOT CONSTITUTE A "STRICT PERFORMANCE GUARANTY"

On appeal, Iron Gate's argument is limited to a single contention: that Tapio breached the contract's "satisfactory performance" warranty,

based on allegedly "undisputed evidence" that Tapio's work did not perform satisfactorily within one year of completion. (Iron Gate's Opening Brief, pp. 13-14). Iron Gate's argument is premised on its assertions that (a) Tapio's work on the project involved "completely" waterproofing the concrete foundation and retaining walls, (b) the warranty at issue is a "strict performance guaranty warranty," and (c) Tapio "absolutely guarantee[d] against any water intrusion."[13] (*Id.* at p. 1) These assertions ignore the actual terms of the parties' contract. Even a cursory review of the contract confirms that Tapio's waterproofing work on the project was limited, that Tapio never contracted to provide a "watertight facility," and that the warranty was neither "strict" nor intended to provide any absolute or unconditional guarantee against water intrusion.

Contract interpretation is a process by which the court gives meaning to a contract's language. **Berg v. Hudesman**, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). A court's primary task in interpreting a written contract is to determine the intent of the parties. **Id.** Inherent in resolution of this issue are the matters of plain meaning and ambiguity. **Id.** Courts search for intent through the objective manifest language of the contract

[13] Iron Gate likewise expansively argues that, under the contract, Tapio's scope of work called for "waterproofing Buildings A and B," that Tapio contracted "to produce a watertight facility," and that Tapio provided an "unconditional promise that no water would intrude the storage units." (Iron Gate's Opening Brief, pp. 6-7)

itself. **Navlet v. Port of Seattle**, 164 Wn.2d 818, 842, 194 P.3d 221 (2008). Under the objective manifestation theory of contracts, the court considers what the parties wrote, giving the contract's words their ordinary, usual and popular meaning. **Renfro v. Kaur**, 156 Wn. App. 655, 662, 235 P.3d 800, **rev. denied**, 170 Wn.2d 1006, 245 P.3d 227 (2010). Courts look to the contract as a whole, including the subject matter, circumstances surrounding its formation, subsequent acts and conduct of the parties, reasonableness of respective interpretations advanced by the parties, trade usage, and/or course of dealing. **Adler v. Fred Lind Manor**, 153 Wn.2d 331, 351, 103 P.3d 773 (2004).

Contract interpretation to determine the parties' intentions is normally a question of fact for the fact finder. **Columbia Asset Recovery Group, LLC v. Kelly**, 177 Wn. App. 475, 484, 312 P.3d 687 (2013). Where the subject matter of a contract is technical in nature, and contract interpretation requires testimony to explain the contract's terms, the meaning of the contract language is a question of fact. **Brown v. Poston,** 44 Wn.2d 717, 720, 269 P.2d 967 (1954). Likewise, if two or more meanings can reasonably be ascribed to contract language, a question of fact is presented. **GMAC v. Everett Chevrolet, Inc.**, 179 Wn. App. 126, 135, 317 P.3d 1074 (2014), **quoting Martinez v. Kitsap Pub. Servs.**, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999), **quoting Interstate Prod.**

Credit Ass'n v. MacHugh, 90 Wn. App. 650, 654, 953 P.2d 812 (1998). Interpretation of a contract is a question of law only if the facts are undisputed and there is no extrinsic evidence on the issue. **Snohomish County Public Transp. Benefit Area Corp v. FirstGroup America, Inc.**, 173 Wn.2d 829, 834, 271 P.3d 850 (2012). Where summary judgment on contract interpretation cannot be had, "the jury must discern the parties' intent in order to interpret the contract." **Wm. Dickson Co. v. Pierce Cty.**, 128 Wn. App. 488, 494, 116 P.3d 409, 413 (2005).

As discussed below, the language of the parties' contract is subject to more than one reasonable interpretation, and there were questions of fact as to the parties' intent as expressed in their contract. Accordingly, the trial court correctly denied Iron Gate's motion for summary judgment and motion for directed verdict, and submitted the contract interpretation issue to the jury. (**See Appendix B**)[14] The jury's decision on the issue is reviewed based on the substantial evidence standard. **Cox v. Charles Wright Acad., Inc.,** 70 Wn.2d 173, 176-77, 422 P.2d 515, 518 (1967).

The language of the warranty is quoted above in its entirety at p. 9. In pertinent part, the warranty provides:

> Contractor warrants and guarantees to Owner (i) the satisfactory performance of the Work for period of one year from _____, the date of Completion . . . . Contractor

[14] CP ___, Jury instruction #9.

> agrees to repair or replace any or all Work, together with any other adjacent work, which may be displaced by so doing, to Owner's satisfaction, that (i) fails to perform for one (1) year from the date of Completion or (ii) proves to be nonconforming or defective in its workmanship or materials within period of two (2) years from the date of Substantial Completion.

(CP 48-60 at p. 55; Ex. 91; underlining emphasis added) The provision does not state that Tapio is "absolutely guarantee[ing] against any water intrusion." It does not contain any "unconditional promise that no water would intrude the storage units." Indeed, the term "water intrusion" appears nowhere in the warranty. Rather, the warranty only guarantees the satisfactory performance of Tapio's "Work," and only for a period of one year.

"Work" is defined as the work specified under the contract's Addendum A. (CP 40-60 at p. 57-58; Ex. 91). The phrase "water intrusion" appears nowhere on Addendum A. There is a single reference to "waterproofing," appearing in paragraph 1.3 of Addendum A's Scope of Work. It specifies:

> 1.3 Retaining wall package to include:
>
> Footing excavation and compaction. Labor and materials to form concrete footings and walls. Furnish and install rebar package. Concrete pumping concrete place and finish. Furnish and install ecoline-r liquid applied membrane waterproofing and "miradrain system" with perforated drain pipe on building "A & B" retaining walls before back filling. All property line retaining walls as required with

> grade on adjacent properties shall be returned to original condition.

(CP 48-60 at p. 58; Ex. 91; underlining emphasis added) Thus, under the parties' contract, the only waterproofing work undertaken by Tapio was installation of a liquid applied waterproofing membrane and drain system on two retaining walls.[15] Contrary to Iron Gate's contention, nothing in the contract defined Tapio's "Work" to require waterproofing of the buildings' foundations, the drive aisle, the concrete aprons, or any other part of facility.

On its face, then, the contractual language reveals no intent to provide for the broad and sweeping guaranty on which Iron Gate now relies. If Iron Gate had intended to provide for such an absolute, watertight guaranty, it should have included that language in the guaranty provision.[16] Indeed, it was Iron Gate that drafted the contract. By choosing to use the same general Master Contract it used with the other contractors on the project, it employed generic language rather than definitive, clear-

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[15] As discussed above, the interior side of the two subgrade retaining walls formed the outer boundaries of the ramped earthen drive aisle between the storage unit structures, and the exterior sides of the retaining walls formed the back walls of the lower level retaining units. (CP 44, ¶6)

[16] **Compare, Diericks v. Vulcan Industries**, 10 Mich.App. 67, 70, 158 N.W.2d 778, 780 (1968), where a contractor that engaged in waterproofing basement walls included this express guarantee in its contract: "Guarantee: We guarantee any area where we have applied our 'Nu-Miracle Process' against all seepage through the walls, providing that all areas or (sic) the sub-soil masonry is free of defective construction. For a period of five years."

cut language crafted to address the specific work that Tapio performed.[17] The generic contract language raised legitimate questions of fact as to what the parties intended by the contract's warranty provision.

The single reference to "membrane waterproofing" in paragraph 1.3 of the Scope of Work attached to the Master Contract as Addendum A, and the relationship of that reference to the warranty provision, was subject to more than one reasonable interpretation. Was the "membrane waterproofing" reference intended to simply describe the specific product and system that Tapio was to furnish and install (i.e., the "ecoline-r liquid applied membrane waterproofing and 'miradrain system' with perforated drainpipe")? Or was it intended to specify, without actually stating it directly, that Tapio's work was to include "completely" waterproofing the concrete foundation and retaining walls, as Iron Gate now contends? If so, how was Tapio to know that when the contract did not say it? What was the procedure by which the waterproofing system was to be applied? How did the parties intend to tie the Addendum's single "waterproofing" reference in the Scope of Work Addendum back to the paragraph 15 warranty provision of the generic Master Contract? And by the "satisfactory performance" reference in paragraph 15, did the parties

[17] Any ambiguities in the language are properly construed against Iron Gate as the contract's drafter. **King v. Rice**, 146 Wn. App. 662, 671, 191 P.3d 946 (2008), **review denied** 165 Wn.2d 1049, 208 P.3d 554 (2009).

intend that the performance be personally satisfactory to Iron Gate, or simply to a reasonable person? These questions, and others, all presented factual issues that were properly submitted for the jury's consideration. *See* **Berg v. Hudesman**, 115 Wn.2d 657, 667-69, 801 P.2d 222, 229-30 (1990); **Wm. Dickson Co. v. Pierce Cty.**, 128 Wn. App. 488, 494, 116 P.3d 409, 413 (2005).

Substantial evidence was presented at trial to support the jury's rejection of Iron Gate's overstated interpretation of the contract language. The evidence included testimony that the Master Contract was drafted by Iron Gate, that substantially the same Master Contract was used with other contractors besides Tapio, that Tapio's specialty was excavation and concrete work, not waterproofing systems, that other parts of the project, such as the cold joints, were not caulked or waterproofed, and that there were multiple possible causes of the water intrusion besides the waterproofing membrane applied to the two retaining walls. Giving the contract's terms their ordinary, usual and popular meaning in light of this substantial extrinsic evidence, both the trial court and the jury properly declined to infer the broad warranty guarantee for which Iron Gate contended, but which was not clearly expressed in the contract language. This Court should affirm both the jury's verdict, and the trial court's denial of Iron Gate's summary judgment and directed verdict motions.

2. THE TRIAL COURT CORRECTLY CONSTRUED THE PARTIES' AGREEMENT WHEN IT CONCLUDED THAT CAUSATION WAS AN ESSENTIAL ELEMENT OF IRON GATE'S BREACH OF CONTRACT CLAIM

Iron Gate argues that the trial court erred when it allowed the jury to "construe" the terms of the contractual warranty. Construction, as opposed to interpretation, involves determining the legal effect or consequences that follow from the parties' intentions as expressed in the contract, **Berg v. Hudesman**, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). Construction of a contract is a question for law. **Pardee v. Jolly**, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). Iron Gate's argument reflects a misunderstanding of the proceedings below. It was the trial court, not the jury, that construed the contractual warranty to include causation as a required legal element of Iron Gate's claim for breach of the contract's warranty provision.

Iron Gate, as plaintiff below, had the burden of proving it had the right to recover. **Western Washington Laborers-Emp. Health & Sec. Trust Fund v. Merlino**, 29 Wn. App. 251, 255, 627 P.2d 1346 (1981); **P.E. Systems, LLC v. CPI Corp.**, 164 Wn. App. 358, 366, 264 P.3d 279 (2011), **aff'd in part, rev'd in part on other grds.**, 176 Wn.2d 198, 289 P.3d 638 (2012). Iron Gate pled its claim against Tapio on a single theory: breach of contract. (CP 23-28). Breach of contract is actionable only if a

contract imposes a duty, the duty was breached, and the breach proximately causes damages. **Northwest Indep. Forest Mfrs. v. Department of Labor and Industries**, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). **See also, C1031 Properties, Inc. v. First American Title Ins. Co.**, 175 Wn. App. 27, 33, 301 P.3d 400 (2013), **Myers v. State**, 152 Wn. App. 823, 827-28, 218 P.3d 241 (2009), **review denied**, 168 Wn.2d 1027, 230 P.3d 1060 (2010). Thus, establishing the causal link between the alleged breach and the allegedly resulting damages was a required element of Iron Gate's breach of contract claim, on which Iron Gate bore the burden of proof.

As a threshold matter, Iron Gate's contention that the trial court erred when it denied Iron Gate's motion in limine and allowed the jury to consider causation issues involving fault of others is precluded by the "invited error" doctrine. **Humbert v. Walla Walla County**, 145 Wn. App. 185, 192, 185 P.3d 660 (2008). Iron Gate recognized that establishing causation was a required element of its claim, as it proposed a jury instruction reciting that Iron Gate, as plaintiff, had the burden of proving that it was damaged "as a result of" Tapio's alleged breach of the contractual warranty provision.[18] **(See Appendix B)**[19] The trial court

[18] **See Funseth v. Great Northern Ry. Co.**, 399 F.2d 918, 922, **cert. denied**, 393 U.S. 1083, 98 S.Ct. 865, 21 L.Ed.2d 775 (9th Cir. 1998) (noting that the words "cause" and "result" are correlative terms, each implying the other).

adopted Iron Gate's formulation of this legal principle. (**See Appendix A**)[20]

Notwithstanding Iron Gate's proposed jury instruction, its position throughout this case has been that its claim for breach of the contractual warranty provision is assessed on a wholly different standard. Iron Gate's argument, in essence, is that it need not establish **any** type of causal link between the alleged breach of the warranty provision and resulting damages. (Opening Brief, p. 15)[21] Rather, Iron Gate's contention has been that the causation element of its breach of contract claim can be effectively inferred by the mere presence of water intrusion in the facility. However, Iron Gate has never cited any case law supporting the conclusion that *res ipsa loquitur*-type principles are properly applied to the causation element of a breach of contract claim. The trial court correctly construed the warranty provision to require a showing of causation to support a breach claim, correctly rejected Iron Gate's legal argument that its claim could be proved without establishing the causal link between the alleged breach and

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[19] CP ___, Iron Gate's Proposed Special Jury Instruction no. 1.

[20] CP ___, Final Jury Instruction #11.

[21] Iron Gate's opening brief argues: "The 'work' need not be defective per se as that implicates a different part of the warranty. Rather, Iron Gate was only required to show that the final product did not "perform" to Iron Gate's satisfaction. The flooding of brand new dry storage units means that the final project did not perform as envisioned by the parties, but particularly Iron Gate."

resulting damages, and correctly denied Iron Gate's motion in limine on causation.

3. EVIDENCE OF BREACH WAS DISPUTED, AND SUBSTANTIAL EVIDENCE SUPPORTS THE CONCLUSION THAT BREACH WAS NOT ESTABLISHED

Under the warranty, Tapio did not warrant the entire project, but only its "Work." And it only guaranteed the satisfactory performance of its "Work" for a period of one year. Accordingly, if the cause of the first year water intrusion was something other than a deficiency in the performance of Tapio's work (i.e., if the cause was the lack of caulking at the cold joints, or some other aspect of construction which was not within Tapio's scope of work), then it was not Tapio's work that was performing unsatisfactorily; it was something else. Given the limited nature of the warranty, it was reasonable and appropriate for the trial court to consider evidence that the cause of water intrusion observed in the first year after the work was completed was something other than non-performance of Tapio's work.

The evidence presented in the trial court demonstrated a clear factual dispute as to whether or not the waterproofing system Tapio installed on the two retaining walls failed to satisfactorily perform for the one year period. Mr. Aronson testified that, although he first became aware of water intrusion issues three or four months after completion of

the project, he did not identify then whether the water observed was from power washing, water from construction, or water intruding through the retaining walls that Tapio built. In other words, Mr. Aronson conceded he could not connect the water observed within the first year after completion of construction with any non-performance of Tapio's work. Likewise, substantial evidence was presented that Tapio was not even contacted about the water intrusion until April 2009, well after the one-year period had expired. Given this evidence, it could reasonably be inferred that Tapio's work was performing satisfactorily during the warranty period.

Similarly, substantial evidence was presented that Tapio's work was not the cause of the water intrusion. Tapio submitted evidence that it installed the waterproofing on the retaining walls in accordance with the manufacturer's installation instructions and applicable building codes. There was also substantial evidence that testing by Tapio's experts showed that water was not penetrating through the retaining walls and causing the water intrusion problems about which Iron Gate complained. Tapio and its experts also offered testimony that the leaks were coming from other sources, involving the work of other parties (including, e.g., the improper placement of floor pan deck installed by Kiwi, and the missing or defective caulking at cold joints by Iron Gate itself). At the same time, Iron Gate's experts testified that they did not make any effort to isolate

individual conditions that could be the source of water intrusion when testing at the site. Moreover, Iron Gate itself identified another cause of the alleged defects: the deficient retaining wall design by structural engineer R.T. Wharton, that caused cracking of the concrete. In short, there was ample evidence to support the conclusion that water intrusion at the facility was not caused by non-performance of Iron Gate's work.

These facts distinguish this matter from the dated decisions on which Iron Gate relies. In **Shopping Center Management Co. v. Rupp**, 54 Wn.2d 624, 343 P.2d 977 (1959), a decision that has not been cited by any Washington court in over 50 years, the non-functioning equipment at issue was a defective pump, and the defect was readily identified and not in question. Accordingly, there was no question that the defective pump was the cause of the **Shopping Center** plaintiff's damages; the causal link between the defect and the resulting damages was not disputed. Here, by contrast, the allegedly non-functioning work is the waterproofing on the retaining wall, and the question of whether any deficiencies in that work are the cause of Iron Gate's damages was disputed and the subject of conflicting evidence. It is also notable that **Shopping Center** was an appeal from a bench trial where the court was also the trier of fact. Here, by contrast, the disputed factual issues as to breach and causation required

the jury to determine the credibility of witnesses and evaluate all of the evidence presented.

The nearly hundred year old decision in **Port of Seattle v. Puget Sound Sheet Metal Works**, 124 Wash. 10, 213 P. 467 (1923) involved circumstances similar to **Shopping Center**. In the **Port of Seattle** case, the non-functioning work was an asphalt roofing material that melted and dripped down on to the floor below within the contractual warranty period. Again, there was no question that the defective roofing material was the cause of the plaintiff's damages – the connection was obvious and undisputed.

Here, no undisputed evidence established that the water intrusion was caused by non-performance or failure of Tapio's work, so as to establish the clear existence of breach. Further, there was a factual question as to whether the parties intended the warranty to be so broad as to apply even where non-performance is due to conditions subsequent over which Tapio had no control. The trial judge, properly skeptical of Iron Gate's sweeping arguments on this point, offered this analogy when he properly denied Iron Gate's motion in limine to prohibit introduction of evidence on the causation issue:

> I'm thinking of my own metal roof at my house where we had to puncture the roof to move the electrical connection as it was coming into the house.

> I'm thinking of a roofer who would guarantee the performance of the roof, and yet an electrician comes in and punctures that roof. And if moisture is getting in where the puncture may have taken place, is it fair to hold the roof -- I don't know.

(RP, Vol. II, 4/4/14, p. 69)

In light of the substantial conflicting evidence submitted on the breach issue, the trial court correctly rejected Iron Gate's arguments on its motion for summary judgment and its motion for directed verdict that there was "undisputed" evidence of breach within the one year warranty period.

4. SUBSTANTIAL EVIDENCE SUPPORTS THE CONCLUSION THAT TAPIO'S WORK WAS NOT THE CAUSE OF THE WATER INTRUSION

Cause in fact is generally a jury question. **Kim v. Budget Rent A Car Sys., Inc.**, 143 Wn.2d 190, 203, 15 P.3d 1283 (2001). As such, the jury's decision is reviewed under the substantial evidence rule. **Thorndike v. Hesperian Orchards, Inc.**, 54 Wn.2d 570, 343 P.2d 183 (1959).

Substantial evidence submitted at trial supported the jury's decision that Iron Gate had failed to prove the required causal connection between the water intrusion it observed within one year after Tapio's work was completed, and non-performance of Tapio's work. As discussed above at pp. 15-29, not only did Tapio present ample evidence that its

work was not the cause of the water intrusion, but Iron Gate's own experts were not able to state with any degree of professional certainty that water intrusion was the cause of the intrusion. Under the circumstances, the trial court correctly denied Iron Gate's motion in limine on causation and allowed the jury to decide the issue.

B. THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES TO TAPIO WAS CORRECT

Washington law supports the trial court's award of attorney's fees to Tapio as the prevailing party below. It is not disputed that the contract between Tapio and Iron Gate contains an attorney fee provision, providing for a fee award to the prevailing party in any action under the contract. It is also undisputed that Tapio was the prevailing party in the Superior Court action. (Iron Gate's Opening Brief, p. 24) Iron Gate argues, without citation to relevant authority, that Tapio is not entitled to an award of fees because it was defended by insurance defense counsel. However, Washington courts consistently award attorney fees in cases where the relevant party is represented by insurance defense counsel, or otherwise did not actually pay legal bills. Washington courts have addressed this issue in the same manner in the context of multiple fee award mechanisms.

In **Harold Meyer Drug v. Hurd,** 23 Wn. App. 683, 598 P.2d 404 (1979), the Court addressed the argument that the defendant, who was entitled to an award for attorney fees under RCW 4.84.290, should not receive fees because she did not actually pay legal fees. The Court held:

> The fact that the mother is represented by a public legal services corporation and the fact that she has paid no actual attorney's fees in this case is immaterial to the determination of reasonable legal fees. See **Tofte v. Department of Social & Health Serv.,** 85 Wash.2d 161, 531 P.2d 808 (1975).

Id. at 687-88, 407 (underlining emphasis added).

The Court of Appeals faced a similar argument in **Pub. Utilities Dist. 1 of Grays Harbor Cty. v. Crea,** 88 Wn. App. 390, 945 P.2d 722 (1997). In that matter, defendant Crea was entitled to an award of attorney fees under RCW 4.84.250. The Plaintiff PUD argued that, because Crea had received a defense under his insurance policy, he was not entitled to a fee award. The Court held that the fact that Crea had not personally paid legal fees was immaterial:

> The PUD argues that the trial court should not have awarded attorney's fees under the statute because Crea's fees were paid by an insurer that was not a party to the lawsuit. The PUD contends that the statute was not intended to benefit non-parties. This argument has no merit and ignores **Harold Meyer Drug v. Hurd,** 23 Wash.App. 683, 687, 598 P.2d 404 (1979), holding that a party's free representation by a public legal services corporation was immaterial to an award of attorney's fees under RCW 4.28.250.

Id. at p.396, 725.

In **Metro. Mortgage & Sec. Co., Inc. v. Becker,** 64 Wn. App. 626, 825 P.2d 360 (1992), the Court addressed a fee award where the prevailing party had not actually paid attorney fees in the context of a contract dispute. In that matter, the Court stated:

> No Washington authority was cited in support of the denial of fees to Metropolitan. The Beckers rely in part on **Continental Ins. Co. v. United States Fid. & Guar. Co.,** 552 P.2d 1122, 1128 (Alaska 1976) (prohibited in-house fees), **disapproved by Farnsworth v. Steiner,** 638 P.2d 181 (Alaska 1981) (disapproves denial of prejudgment interest); **Greater Anchorage Area Borough v. Sisters of Charity,** 573 P.2d 862, 863 (Alaska 1978) (allowed in-house fees to public interest firm engaging solely in litigation); **Escanaba & Lake Superior R.R. v. Keweenaw Land Ass'n, Ltd.,** 156 Mich.App. 804, 402 N.W.2d 505, 511-12 (1986) (prohibits in-house fees unless counsel is paid more than normal salary for the work). These cases are not dispositive. We agree with the court's statement in **Greater Anchorage,** at 862-63, in explaining its position in the earlier case, **Continental Ins.,** at 1128: "We did not intend to express a prohibition against awarding attorney's fees when a party's active representation in litigation is by in-house counsel rather than retained counsel."

Id. at 632, 364. As in this case, the contract provided for attorney fees for the prevailing party, and was analyzed under RCW 4.84.330 and Washington law. **Id.** at 632-633, 364. Again, the Court of Appeals held that the award of fees was proper.

Iron Gate ignores established Washington law regarding attorney fee awards, instead directing this Court to a single case which is not even related to such awards. In **State v. Goodrich**, 47 Wn. App. 114, 733 P.2d 1000 (1987), cited by Iron Gate, the Court addressed Washington's criminal restitution statute, RCW 9.94A.140(1). The Court interpreted the express language of that statute in order to determine whether it allowed for an award of future medical expenses, not yet incurred. **Id. Goodrich** has no connection to the facts or law at issue in the present matter.

Further, Iron Gate's position is in direct opposition to established Washington law holding that a wrongdoer has no right to benefit from another's purchase of insurance coverage. **Alaska Pac. S. S. Co. v. Sperry Flour Co.,** 94 Wash. 227, 230, 162 P. 26, 27 (1917). A defense to suits alleging claims that may be covered by the insurance contract is one of the benefits of the purchase of an insurance policy. **Kirk v. Mt. Airy Ins. Co.,** 134 Wn.2d 558, 564, 951 P.2d 1124, 1127 (1998). Iron Gate is attempting to reap a benefit from Tapio's insurance contract, which is expressly prohibited by Washington law. **Sperry Flour, supra,** 94 Wash. at 230.

C. TAPIO, NOT IRON GATE, IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND COSTS ON THIS APPEAL

The parties' contract includes the following attorney's fee provision in Section 15:

> In the event of litigation between the parties hereto, declaratory or otherwise, for or on account of the breach of or to enforce or interpret any of the covenants, agreements, terms or conditions of the Contract Documents, and notwithstanding any other provisions therein, the losing party shall pay all costs and reasonable attorneys' fees actually incurred by the prevailing party, including those on appeal, the amount of which shall be fixed by the court and shall be made part of any judgment rendered.

(CP 48-60 at 55; Ex. 91; underlining emphasis added) Accordingly, this Court should affirm the trial court in all respects, and allow Tapio to apply for an award of its attorney's fees incurred on this appeal.

V. CONCLUSION

The trial court correctly rejected Iron Gate's assertions as to the breadth of the parties' contract, both on its motion for summary judgment, its motion in limine, and its motion for directed verdict, and allowed the jury to decide factual questions relating to the parties' intent as expressed in their contract, and the causation issue. The trial court's rulings were correct and should be affirmed.

DATED this 27th day of April, 2016.

SOHA & LANG, P.S.

By: _____
Mary R. DeYoung, WSBA #16264
Jennifer P. Dinning, WSBA #38236
Attorneys for Respondent Tapio Construction, Inc.

APPENDIX

Appendix A - Plaintiff's Proposed Jury Instructions;

Appendix B - Court's Final Instructions to Jury.

DECLARATION OF SERVICE

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action; my business address is SEBALY & LANG, PS, 1325 Fourth Avenue, Suite 2000, Seattle, WA 98101.

On April 27, 2016, I served a true and correct copy of RESPONDENT'S BRIEF (with attached **Declaration of Service**) on parties in this action as indicated:

Phillip J. Haberthur
George J. Souris
Richard G. Matson
Landerholm, P.S.
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P.O. Box 1086
Vancouver, WA 98666-1086
Tel: 360.696.3312
Email: philh@landerholm.com
george.souris@landerholm.com
dick.matson@landerholm.com
Counsel for Appellant Iron Gate

Executed on this 27th day of April, 2016, at Seattle, Washington.

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

s/Debbie Low
Debbie Low
Legal Secretary to Mary R. DeYoung

Appendix "A"

PLAINTIFF'S PROPOSED JURY INSTRUCTION # 1

This is a civil case brought by plaintiff Iron Gate 5 Partners, L.L.C., against defendant Tapio Construction Inc. The plaintiff's lawyer is Richard G. Matson. The defendant's lawyer is W. Scott Noel. This case arises out of a breach of contract.

The plaintiff claims that the defendant breached express warranties within the contract. The defendant denies asserting that the plaintiff or others are at fault and that the plaintiff failed to mitigate damages.

It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during this trial. Evidence is a legal term. Evidence includes such things as testimony of witnesses, documents, or other physical objects.

One of my duties as judge is to decide whether or not evidence should be admitted during this trial. What this means is that I must decide whether or not you should consider evidence offered by the parties. For example, if a party offers a photograph as an exhibit, I will decide whether it is admissible. Do not be concerned about the reasons for my rulings. You must not consider or discuss any evidence that I do not admit or that I tell you to disregard.

The evidence in this case may include testimony of witnesses or actual physical objects, such as papers, photographs, or other exhibits. Any exhibits admitted into evidence will go with you to the jury room when you begin your deliberations. When witnesses testify, please listen very carefully. You will need to remember testimony during your deliberations because testimony will rarely, if ever, be repeated for you.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is contained in my instructions. You must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions. Our state constitution prohibits a trial judge from making a comment on the evidence. For example, it would be improper for me to express my personal opinion about the value of a particular witness's testimony. Although I will not intentionally do so, if it appears to you that I have indicated my personal opinion concerning any evidence, you must disregard that opinion entirely.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

In deciding this case, you will be asked to apply a concept called "burden of proof." The phrase "burden of proof" may be unfamiliar to you. Burden of proof refers to the measure or amount of proof required to prove a fact. The burden of proof in this case is proof by a preponderance of the

evidence. Proof by a preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true.]

During your deliberations, you must apply the law to the facts that you find to be true. It is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you think it ought to be. You are to apply the law you receive from my instructions to the facts and in this way decide the case.

I would also like to introduce you to the court clerk, [Mr.] [Ms.] , and the bailiff, [Mr.] [Ms.] . The job of the court clerk is to keep track of all documents and exhibits and to make a record of rulings made during the trial. The bailiff keeps the trial running smoothly. You will be in the care of the bailiff throughout this trial. [Mr.] [Ms.] will help you with any problems you may have related to jury service. Please follow any instructions that [he] [she] gives you.

Now I will explain the procedure to be followed during the trial.

First: The lawyers will have an opportunity to make opening statements outlining the testimony of witnesses and other evidence that they expect to be presented during trial.

Next: The plaintiff will present the testimony of witnesses or other evidence to you. When the plaintiff has finished, the defendant may present the testimony of witnesses or other evidence. Each witness may be cross-examined by the other side.

Next: When all of the evidence has been presented to you, I will instruct you on what law applies to this case. I will read the instructions to you out loud. You will have individual copies of the written instructions with you in the jury room during your deliberations.

Next: The lawyers will make closing arguments.

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a "verdict." Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. "No discussion" also means no e-mailing, text messaging, blogging, or any other form of electronic communications.
You will be allowed to take notes during this trial. I am not instructing you to take notes, nor am I encouraging you to do so. Taking notes may interfere with your ability to listen and observe. If you choose to take notes, I must remind you to listen carefully to all testimony and to carefully observe all witnesses.

At an appropriate time, the bailiff will provide a note pad and a pen or pencil to each of you. Your juror number will be on the front page of the note pad. You must take notes on this pad only, not on any other paper. You must not take your note pad from the courtroom or the jury room for any reason. When you recess during the trial, please stay near the courthouse or in the jury room, unless instructed otherwise. At the end of the day, the note pads must be left in the

courtroom. While you are away from the courtroom or the jury room, no one else will read your notes.

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

You are not to assume that your notes are necessarily more accurate than your memory. I am allowing you to take notes to assist you in remembering clearly, not to substitute for your memory. You are also not to assume that your notes are more accurate than the memories or notes of the other jurors.

After you have reached a verdict, your notes will be collected and destroyed by the bailiff. No one will be allowed to read them.

You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning. You may ask questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you ask any questions, remember that your role is that of a neutral fact finder, not an advocate.

Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question to determine if it is legally proper.

There are some questions that I will not ask, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a juror's question, or if I rephrase it, do not attempt to speculate as to the reasons and do not discuss this circumstance with the other jurors.

By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.

Throughout this trial, you must come and go directly from the jury room. Do not remain in the hall or courtroom, as witnesses and parties may not recognize you as a juror, and you may accidentally overhear some discussion about this case. I have instructed the lawyers, parties, and witnesses not to talk to you during trial.

It is essential to a fair trial that everything you learn about this case comes to you in this courtroom, and only in this courtroom. You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence, and do not remain within hearing of such conversations. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.

Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, blogs, the internet, or radio or television broadcasts which may discuss this case or issues involved in this trial. If you start to hear or read information about anything related to the case, you must act immediately so that you no longer hear or see it. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case.

During the trial, do not try to determine on your own what the law is. Do not seek out any evidence on your own. Do not consult dictionaries or other reference materials. Do not conduct any research into the facts, the issues, or the people involved in this case. This means you may not use Google or other internet search engines, internet resources, newspapers, etc., to look into anything at all related to this case. Do not inspect the scene of any event involved in this case. If your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate. You must keep your mind clear of anything that is not presented to you in this courtroom.

During the trial, do not provide information about the case to other people, including any of the lawyers, parties, witnesses, your friends, members of your family, or members of the media. If necessary, you may tell people, such as your employer, that you are a juror and let them know when you need to be in court. If people ask you for more details, you should tell them that you are not allowed to talk about the case until it is over.

I want to emphasize that the rules prohibiting discussions include your electronic communications. You must not send or receive information about anything related to the case by any means, including by text messages, e-mail, telephone, internet chat, blogs, or social networking web sites.

In short, do not communicate with anyone, by any means, concerning what you see or hear in the courtroom, and do not try to find out more about anything related to this case, by any means, other than what you learn in the courtroom. These rules ensure that the parties will receive a fair trial.

If you become exposed to any information other than what you learn in the courtroom, that could be grounds for a mistrial. A mistrial would mean that all of the work that you and your fellow jurors put into this trial will be wasted. Re-trials are costly and burdensome to the parties and the public. Also, if you communicate with others in violation of my orders, you could be fined or held in contempt of court.

After you have delivered your verdict, you will be free to do any research you choose and to share your experiences with others.

Remember that all phones, PDAs, laptops, and other communication devices must be turned off while you are in court and while you are in deliberations.

Throughout the trial, you must maintain an open mind. You must not form any firm and fixed opinion about any issue in the case until the entire case has been submitted to you for deliberation.

As jurors, you are officers of this court. As such, you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

To accomplish a fair trial takes work, commitment, and cooperation. A fair trial is possible only with a serious and continuous effort by each one of us, working together. Thank you for your willingness to serve this court and our system of justice.

WPI 1.01: Advance Oral Instruction – Beginning of Proceedings

PLAINTIFF'S PROPOSED JURY INSTRUCTION # 2

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses [, and the exhibits that I have admitted,] during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark,

statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

WPI 1.02: Conclusion of Trial – Introductory Instruction

PLAINTIFF'S PROPOSED JURY INSTRUCTION # 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

WPI 1.03: Direct and Circumstantial Evidence

PLAINTIFF'S PROPOSED JURY INSTRUCTION # 4

The law treats all parties equally whether they are corporations, such as plaintiff and defendant, or individuals. This means that corporations and individuals are to be treated in the same fair and unprejudiced manner.

WPI 1.07: Corporations and Similar Parties

PLAINTIFF'S PROPOSED JURY INSTRUCTION # 5

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict. Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to reach a verdict ten of you must agree. When ten of you have agreed, then the presiding juror will fill in the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with it. The presiding juror will then inform the bailiff that you have reached a verdict. The bailiff will conduct you back into this courtroom where the verdict will be announced.

WPI 1.08: Concluding Instruction – For General Verdict Form

PLAINTIFF'S PROPOSED VERDICT FORM A

Verdict Form A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

IRON GATE PARTNERS 5, L.L.C.,	)	
	)	
Plaintiff,	)	
	)	**No. 11-2-01709-9**
vs.	)	
	)	
TAPIO CONSTRUCTION, INC.,	)	**VERDICT FORM A**
	)	
Defendant.	)	

We, the jury, find for the plaintiff in the sum of $_____.

DATE: _____

_____

Presiding Juror

WPI 45.01 General Verdict Forms – Single Plaintiff and Defendant

PLAINTIFF'S PROPOSED VERDICT FORM B

Verdict Form B

IN THE SUPERIOR COURT OF THE STATE OF

WASHINGTON FOR CLARK COUNTY

IRON GATE PARTNERS 5, L.L.C.,	)	
Plaintiff,	)	**No. 11-2-01709-9**
vs.	)	
TAPIO CONSTRUCTION, INC.,	)	**VERDICT FORM B**
Defendant.	)	

We, the jury, find for the defendant.

DATE:_____

_____

Presiding Juror

WPI 45.01 General Verdict Forms – Single Plaintiff and Defendant

PLAINTIFF'S PROPOSED JURY INSTRUCTION # 6

The fact that a witness has talked with a party, lawyer, or party's representative does not, of itself, reflect adversely on the testimony of the witness. A party, lawyer, or representative of a party has a right to interview a witness to learn what testimony the witness will give.

WPI 2.06: Witness Who Has Been Interviewed

PLAINTIFF'S PROPOSED JURY INSTRUCTION # 7

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

WPI 2.10: Expert Testimony

PLAINTIFF'S PROPOSED JURY INSTRUCTION # 8

You have been permitted to view a site involved in this case for the sole purpose of helping you understand the evidence presented to you in this courtroom. What you actually saw at the site or its surrounding area is not evidence. The physical features at the site may or may not have changed. The conditions that prevailed at the time of the occurrence or other relevant times may or may not have changed. You are to rely solely on the testimony of witnesses and on the exhibits in order to decide issues involving the physical characteristics or appearance of the site at the time of the events in question.

WPI 2.14: View of Site is Not Evidence

PLAINTIFF'S PROPOSED JURY INSTRUCTION # 9

We are about to begin the jury selection process, sometimes called "voir dire." It is important for the fairness of the trial that your answers be truthful and complete. *[The clerk of this court] [I]* will ask you as a group to give your oath to tell the truth. After you have done so, you will be asked questions concerning your ability to serve as jurors in this case.

(Oath on voir dire: "Do you solemnly swear or affirm that you will truthfully answer the questions that will be asked of you by the court or the attorneys concerning your qualifications to act as jurors in this case [, so help you God]? Did any of you answer in the negative or fail to respond?").

You will be asked a number of questions as part of the jury selection process. These questions may sometimes involve issues that are sensitive for you. If at any time you are uncomfortable answering a particular question in front of the other jurors, please raise your hand or notify the bailiff. We may then discuss other ways to handle this question.

WPI 6.01: Before Administering Oath on Voir Dire

PLAINTIFF'S PROPOSED JURY INSTRUCTION # 10

During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. This applies to your internet and electronic discussions as well—you may not talk about the case via text messages, e-mail, telephone, internet chat, blogs, or social networking web sites. If anybody asks you about the case, or about the people or issues involved in the case, you are to explain that you are not allowed to discuss it.

Do not allow anyone to give you information about the case, including in your electronic communications. If you overhear a discussion or start to receive information about anything related to this case, you must act immediately so that you no longer hear or see it.

Do not read, view, or listen to any report from the newspaper, magazines, social networking sites, blogs, radio, or television on the subject of this trial. Do not conduct any internet research or consult any other outside sources about this case, the people involved in the case, or its general subject matter. You must keep your mind open and free of outside information. Only in this way will you be able to decide the case fairly based solely on the evidence and my instructions on the law.

WPI 6.02: Before Recesses

PLAINTIFF'S PROPOSED JURY INSTRUCTION # 11

You will now be taken to view a site or area involved in this case. You will be under the supervision of the bailiff, *[Mr.] [Ms.]*, the entire time that you are away from this courtroom. You must remain together at all times until the bailiff excuses you.

You will be taken to view the site for the sole purpose of helping you to understand the evidence presented to you in this courtroom. What you actually see at the site and its surrounding area is not evidence. The physical features at the site may have changed. The conditions that prevailed at the time of the occurrence or other relevant times may have changed. You are to rely solely on the testimony of witnesses and on the exhibits admitted in the courtroom in deciding issues involving the physical characteristics or appearance of the site at the time of the events in question.

During the site visit, you may not ask questions or discuss the case among yourselves or with anyone else. The lawyers may not discuss the case or comment on the site, but may be allowed by the court to point out particular features.

As a preliminary matter, the parties have identified the following conditions that may be present at the site and wish for you to look at the following while out at the site:

1. Walk up the ramp and on the driveway aisle to see the following:
    a. The interiors of units A240, A263, B244, and B260 all on the second level.
    b. Note the saw cuts on the surface of the second floor concrete slabs in places within the units.
    c. Note the cracks in the units including whether or not they propagate from the end of saw cuts and how far they extend under the roll up doors toward the edge of the slab.
    d. Look at the overhead door jamb condition.
    e. Look at the bottom of the second floor metal walls where they connect to the slab including the anchor bolts that connect the bottom track to the concrete slab.
    f. Look at the swinging door conditions at the base of the door.
2. Note the downspouts and stormwater drains on the upper level of the driveway aisle.
3. Note the areas where the plaintiff's and the defendant's destructive investigations took place.
4. Look at the seam where the drive way aisle abuts against the edge of the concrete slab of both buildings on each side of the driveway.

5. Look into the interiors of two berm units in each building (A27, A29, B29 and B49).

   a. Look at the condition of the cracking on the inside of the retaining walls.

   b. Look at the water staining and the locations where the water expresses itself on the interior of the retaining walls.

   c. Look at the connection of the rebar between the top of the retaining wall and the bottom of the second floor slab.

   d. Note the connection of the pan deck at the top of the retaining wall.

PLAINTIFF'S PROPOSED JURY INSTRUCTION # 12

I am allowing the computer generated (Exhibit No. 77) to be used for illustrative purposes only. This means that its status is different from that of other exhibits in the case. This exhibit is not itself evidence. Rather, it is an expert's visual aid offered to assist you in understanding and evaluating the evidence in the case. Keep in mind that actual evidence is the testimony of witnesses and the exhibits that are admitted into evidence.

Because it is not itself evidence, this exhibit will not go with you to the jury room when you deliberate. The lawyers and witnesses may use the exhibit now and later on during this trial. You may take notes from this exhibit if you wish, but you should remember that your decisions in the case must be based upon the evidence.

WPI 6.06: Exhibit Admitted for Illustrative Purposes

PLAINTIFF'S PROPOSED JURY INSTRUCTION #13

You will now be given testimony from a deposition. A deposition is testimony of a witness taken under oath outside of the courtroom. The oath is administered by an authorized person who records the testimony word for word. Depositions are taken in the presence of lawyers for both parties. The lawyers may object to the questions asked of the witness. I will rule on any objections contained in the deposition.

The deposition will be presented by video. Insofar as possible, you must consider this form of testimony in the same way that you consider the testimony of witnesses who are present in the courtroom. You must decide how believable the testimony is and what value to give to it. A copy of the deposition will not be admitted into evidence and will not go to the jury room with you.

WPI 6.09: Use of Depositions

PLAINTIFF'S PROPOSED JURY INSTRUCTION # 14

You will now be given evidence in the form of answers to written interrogatories. Interrogatories are questions asked in writing by one party and directed to another party. The answers to interrogatories are given in writing, under oath, before trial.

The answers to interrogatories will be read aloud to you. Insofar as possible, give them the same consideration that you would give to answers of a witness testifying from the witness stand.

WPI 6.10: Use of Interrogatories of a Party

PLAINTIFF'S PROPOSED JURY INSTRUCTION # 15

A contract is a legally enforceable promise or set of promises.

WPI 301.01: Contract Defined

PLAINTIFF'S PROPOSED SPECIAL JURY INSTRUCTION # 1

I will now describe for you the basic elements of the claims and defenses that the parties intend to prove in this case. I am doing so for only one purpose: to help you evaluate the evidence as it is being presented.

Please remember that the claims and defenses might change during the course of a trial. For this reason, this instruction is preliminary only. It may differ from the final instructions you receive at the end of the trial. Your deliberations will be guided entirely by those final instructions.

The following is a summary of the claims of the parties provided to help you understand the issues in the case. You are not to take this instruction as proof of the matters claimed. It is for you to decide, based upon the evidence presented, whether a claim has been proved.

Plaintiff has the burden of proving each of the following propositions on its claim of breach of contract:

(1) That Tapio entered into a contract with Iron Gate;

(2) That the terms of the contract included:

(a) Tapio's warranty to Iron Gate that all of its workmanship shall be of good quality, free from faults and defects;
(b) Tapio's warranty to Iron Gate that all of its workmanship shall be in conformance with the Contract Documents;
(c) Tapio's warranty and guaranty to Iron Gate that its Work would satisfactorily perform for a period for one (1) year from the date of Completion;
(d) Tapio's agreement to repair or replace any or all Work, together with any other adjacent work, which may be displaced by so doing to Iron Gate's satisfaction that (i) fails to perform for one (1) year from the date of Completion;
(e) Tapio's agreement to repair or replace any or all Work, together with any other adjacent work, which may be displaced by so doing to Iron Gate's satisfaction that proves to be non-conforming or defective in its workmanship or materials within a period of two (2) years from the date of Substantial Completion without any expense whatsoever to owner, ordinary wear and tear and unusual abuse or neglect excepted;
(f) Tapio's acceptance of the risk of an error, inconsistency or omission in the Agreement Documents that Tapio recognized or should have recognized; and
(g) Tapio's acceptance of the risk or work performed by others which is either included in Tapio's Work or performed in the same area as Tapio's Work in the event Tapio accepted the underlying work when it knew, or reasonable examination would have revealed, it to be defective.

(3) That Tapio breached the contract in one or more of the ways claimed by Iron Gate;

(4) That Iron Gate had performed its obligations under the contract;

(5) That Iron Gate was damaged as a result of Tapio's breach.

On the other hand, Defendant Tapio has the burden of proving the following affirmative defenses:

Mitigation of damages: A plaintiff who sustains damage as a result of a defendant's breach of contract has a duty to minimize its loss. Plaintiff is not entitled to recover for any part of the loss that it could have avoided with reasonable efforts. However, a person or entity that has been injured by another's wrongdoing is given wide latitude and is only required to act reasonably in mitigating its damages.[1] The defendant has the burden to prove plaintiff's failure to use reasonable efforts to minimize its loss, and the amount of damages that could have been minimized or avoided. Plaintiff may recover expenses connected with reasonable efforts to avoid loss.

WPI 1.03: Advance Oral Instruction – Preliminary Instruction on Claims and Defenses, as modified to include WPI 300.01: Issues – Breach of Contract – Damages and WPI 300.03: Burden of Proof on the Issues – Breach of Contract – With Affirmative Defenses

[1] *Hogland v. Klein*, 49 Wn.2d 216, 221, 298 P.2d 1099 (1956)

PLAINTIFF'S PROPOSED SPECIAL JURY INSTRUCTION # 2

The failure to perform fully a contractual duty when it is due is a breach of contract. In addition, a breach of an express warranty gives rise to a cause of action.[2]

WPI 302.01: Breach of Contract – Non-performance of Duty, as modified by footnote 2

[2] *Hurley-Mason Co.*, 79 Wash. 366, 375 and *Crandall Eng'g Co. v. Winslow M. R. & S. Co.*, 188 Wash. 1, 9, 61 P.2d 136 (1936).

PLAINTIFF'S PROPOSED SPECIAL JURY INSTRUCTION # 3

Plaintiff Iron Gate claims that Defendant Tapio breached an express warranty because the work did not conform to an affirmative of fact or promise made by the defendant. An express warranty is a specific oral or written representation that distributes the risk of specified defects or failures between the parties to the agreement.[3] Generally speaking, the burden of proving an issue rests on the person asserting the affirmative of the issue, that is, the existence of an express warranty. The express warranties in this case are said to be:

(a) Tapio's warranty to Iron Gate that all of its workmanship shall be of good quality, free from faults and defects;

(b) Tapio's warranty to Iron Gate that all of its workmanship shall be in conformance with the Contract Documents;

(c) Tapio's warranty and guaranty to Iron Gate that its Work would satisfactorily perform for a period for one (1) year from the date of Completion;

(d) Tapio's agreement to repair or replace any or all Work, together with any other adjacent work, which may be displaced by so doing to Iron Gate's satisfaction that (i) fails to perform for one (1) year from the date of Completion;

(e) Tapio's agreement to repair or replace any or all Work, together with any other adjacent work, which may be displaced by so doing to Iron Gate's satisfaction that proves to be non-conforming or defective in its workmanship or materials within a period of two (2) years from the date of Substantial Completion without any expense whatsoever to owner, ordinary wear and tear and unusual abuse or neglect excepted;

(f) Tapio's acceptance of the risk of an error, inconsistency or omission in the Agreement Documents that Tapio recognized or should have recognized; and

(g) Tapio's acceptance of the risk or work performed by others which is either included in Tapio's Work or performed in the same area as Tapio's Work in the event Tapio accepted the underlying work when it knew, or reasonable examination would have revealed, it to be defective.

The Court has already determined that these express warranties existed within the contract and that the parties agreed to be bound by these warranties.[4] Your duty, as the jury, is to determine whether Tapio breached these warranties with regard to the work it provided at the Iron Gate facility.[5]

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[3] *Hurley-Mason Co. v. Stebbins*, 79 Wash. 366, 374, 140 P. 381 (1914). 36

[4] Contract interpretation is a matter of law. *Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 282, 313 P.3d 395 (2013).

[5] *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 826 P.2d 664 (1992).

WPI 300.03: Burden of Proof on the Issues – Breach of Contract – With Affirmative Defenses, as modified by footnotes 3-5.

PLAINTIFF'S PROPOSED SPECIAL JURY INSTRUCTION # 4

In a contract, a contractor may guarantee that the work done by the contractor will perform satisfactorily. Where the guaranty provision in the contract between the parties provides that the contractor guarantees the satisfactory performance of its work, and the contract includes the plans and specifications, then it is immaterial whether the work failed to perform satisfactorily because of defects in the plans and specifications, because of defective materials, equipment, or workmanship or because of defects in the work of other contractors involved in the defendant's work.[6]

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[6] *Shopping Ctr. Management Co. v. Rupp*, 54 Wn.2d 624, 631-633, 343 P.2d 877 (1959) and *Seattle v. Puget Sound Sheet Metal Works*, 124 Wash. 10, 213 P. 467 (1923).

PLAINTIFF'S PROPOSED SPECIAL JURY INSTRUCTION # 5

In Washington, parties are free to contract as they wish and the courts are reluctant to interfere with the parties' rights to contract, and part of this freedom to contract includes the ability of the parties to allocate the risks and obligations as they please.[7]

[7] *Watson v. Ingram*, 124 Wn.2d 845, 851-852, 881 P.2d 247 (1994)

PLAINTIFF'S PROPOSED SPECIAL JURY INSTRUCTION # 6

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

A party injured by a breach of contract may recover all damages that accrue naturally from the breach, including any incidental or consequential losses the breach caused.[8]

In cases involving breach of a construction contract, such as here, the standard measure of recovery is the reasonable cost of completing performance or remedying defects in the construction.[9] In other words, an injured party to a construction contract is entitled to expectation damages, or to return the injured party to as good a pecuniary position as he/she would have had if the breaching party would have performed properly. [10] If a contractor, for example, performs defective or incomplete work or if a contractor's work fails to perform satisfactorily, the owner is entitled to compensation sufficient to repair, replace, or complete the work. Washington law also entitles an aggrieved party to be compensated for lost rent for not having a rent-generating building due to defects in the construction.[11]

WPI 303.01: Measure of Expectation Damages - Breach of Contract - No Counterclaim, as modified for construction cases by footnotes 8-12.

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[8] *Floor Exp., Inc. v. Daly*, 138 Wn. App. 750, 754, 158 P.3d 619 (2007).
[9] *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 427, 10 P.3d 417 (2000); *citing Eastlake Constr. Co., Inc. v. Hess*, 102 Wn.2d 30, 46, 686 P.2d 465 (1984) (*quoting* Restatement (Second) of Contracts § 348 (1981)).
[10] *Floor Exp., Inc.*, 138 Wn. App. at 754.
[11] *Lincor Contractors v. Hyskell*, 39 Wn. App. 317, 322, 692 P.2d 903 (1984).

Appendix "B"

SUPERIOR COURT OF WASHINGTON

FOR CLARK COUNTY

IRON GATE PARTNERS 5, L.L.C.,

Plaintiff,

vs.

TAPIO CONSTRUCTION, INC., AND R.T. WHARTON & ASSOCIATES, INC

Defendant

TAPIO CONSTRUCTION, INC.,

Third-Party Plaintiff,

No. 11 2 01709 9

vs.

A & A CONTRACTING, INC.

Third-Party Defendant.

COURT'S INSTRUCTIONS TO THE JURY

Dated this 1 day of ~~April~~ May, 2014.

THE HONORABLE DAVID E. GREGERSON

JURY INSTRUCTION # 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark,

statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

JURY INSTRUCTION # 2

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

JURY INSTRUCTION # 3

You have been permitted to view a site involved in this case for the sole purpose of helping you understand the evidence presented to you in this courtroom. What you actually saw at the site or its surrounding area is not evidence. The physical features at the site may or may not have changed. The conditions that prevailed at the time of the occurrence or other relevant times may or may not have changed. You are to rely solely on the testimony of witnesses and on the exhibits in order to decide issues involving the physical characteristics or appearance of the site at the time of the events in question.

JURY INSTRUCTION # 4

The law treats all parties equally whether they are corporations, such as plaintiff and defendant, or individuals. This means that corporations and individuals are to be treated in the same fair and unprejudiced manner.

JURY INSTRUCTION # 5

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

JURY INSTRUCTION # 6

The fact that a witness has talked with a party, lawyer, or party's representative does not, of itself, reflect adversely on the testimony of the witness. A party, lawyer, or representative of a party has a right to interview a witness to learn what testimony the witness will give.

INSTRUCTION NO. 7

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

JURY INSTRUCTION # 8

A contract is a legally enforceable promise or set of promises.

INSTRUCTION NO. 9

A contract is to be interpreted to give effect to the intent of the parties at the time they entered the contract.

You are to take into consideration all the language used in the contract, giving to the words their ordinary meaning, unless the parties intended a different meaning.

You are to determine the intent of the contracting parties by viewing the contract as a whole, considering the subject matter and apparent purpose of the contract, all the facts and circumstances leading up to and surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations offered by the parties.

JURY INSTRUCTION # 10

The failure to perform fully a contractual duty when it is due is a breach of contract. In addition, a breach of an express warranty gives rise to a cause of action.

JURY INSTRUCTION No. 11

Iron Gate has the burden of proving each of the following propositions on its claim of breach of contract:

(1) That Tapio entered into a contract with Iron Gate;

(2) That the terms of the contract included:

(a) Tapio's warranty to Iron Gate that all of its workmanship shall be of good quality, free from faults and defects;
(b) Tapio's warranty to Iron Gate that all of its workmanship shall be in conformance with the Contract Documents;
(c) Tapio's warranty and guaranty to Iron Gate that its Work would satisfactorily perform for a period for one (1) year from the date of Completion;
(d) Tapio's agreement to repair or replace any or all Work, together with any other adjacent work, which may be displaced by so doing to Iron Gate's satisfaction that (i) fails to perform for one (1) year from the date of Completion, without any expense whatsoever to Iron Gate, ordinary wear and tear and unusual abuse or neglect excepted;
(e) Tapio's agreement to repair or replace any or all Work, together with any other adjacent work, which may be displaced by so doing to Iron Gate's satisfaction that proves to be non-conforming or defective in its workmanship or materials within a period of two (2) years from the date of Substantial Completion, without any expense whatsoever to Iron Gate, ordinary wear and tear and unusual abuse or neglect excepted;
(f) Tapio's acceptance of the risk of an error, inconsistency or omission in the Agreement Documents that Tapio recognized or should have recognized; and
(g) Tapio's acceptance of the risk or work performed by others which is either included in Tapio's Work or performed in the same area as Tapio's Work in the event Tapio accepted the underlying work when it knew, or reasonable examination would have revealed, it to be defective;
(h) Tapio's agreement to waive and release any right to require Iron Gate to proceed against any other party whatsoever.

(3) That Tapio breached the contract in one or more of the ways claimed by Iron Gate;

(4) That Iron Gate had performed its obligations under the contract;

(5) That Iron Gate was damaged as a result of Tapio's breach.

On the other hand, Defendant Tapio has the burden of proving the following affirmative defenses:

a.) Plaintiff's alleged damages, if any, were due in whole or in part to the acts, omissions, conditions, or fault of persons, entities or parties over whom Tapio had no control or right to control.

b.) Plaintiff has failed to mitigate or otherwise minimize their damages, and the same is subject to the doctrine of avoidable consequences.

c.) Plaintiff's claims are barred to the extent Tapio's work has been altered, repaired, removed, replaced or destroyed without proper notice or chance for review.

d.) To the extent the scope and cost of the repairs are unreasonable and unnecessary, it will amount to betterment or in the alternative any proposed repairs by Plaintiff constitute economic waste.

e.) Tapio is not liable for damages which resulted from any faulty direction, specifications, or instructions provided by Plaintiff or other applicable contractors, developers, architects, or design professionals.

Iron Gate denies these claims.

(3) Tapio Construction further denies that Iron Gate was damaged by its work under the contract.

(4) Tapio Construction further denies the nature and extent of the claimed damage.

INSTRUCTION NO. 12

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

In order to recover actual damages, the plaintiff has the burden of proving that the defendant breached a contract with it, and that plaintiff incurred actual economic damages as a result of the defendant's breach, and the amount of those damages.

If your verdict is for plaintiff on plaintiff's breach of contract claim and if you find that plaintiff has proved that it incurred actual damages and the amount of those actual damages, then you shall award actual damages to the plaintiff.

Actual damages are those losses that were reasonably foreseeable, at the time the contract was made, as a probable result of a breach. A loss may be foreseeable as a probable result of a breach because it follows from the breach either

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

In calculating the plaintiff's actual damages, you should determine the sum of money that will put the plaintiff in as good a position as it would have been in if both plaintiff and defendant had performed all of their promises under the contract.

The burden of proving damages rests with the plaintiff and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. You must be governed by your own judgment, by the

evidence in the case, and by these instructions, rather than by speculation, guess, or conjecture.

Instruction No. 12A

If you find that plaintiff incurred damages, you must determine the degree to which defendant proved that said damages were the result of one or more of defendant's affirmative defenses, expressed as a percentage, attributable to the plaintiff. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

INSTRUCTION NO. 13

In this case Iron Gate Partners 5, L,L.C claims Lost revenue. Iron Gate's damages may include lost revenues if Iron Gate proves with reasonable certainty that lost revenue would have been earned, but were not earned because of Tapio's breach.

"Reasonable certainty" relates to the fact of damage rather than the amount of damage.

INSTRUCTION NO. 14

Any award for future economic damages must be for the present cash value of those damages.

"Present cash value" means the sum of money needed now which, if invested at a reasonable rate of return, would equal the amount of loss at the time in the future when the profits would have been received.

The rate of interest to be applied in determining present cash value should be that rate which in your judgment is reasonable under all the circumstances. In this regard, you should take into consideration the prevailing rates of interest in the area that can reasonably be expected from safe investments that a person of ordinary prudence, but without particular financial experience or skill, can make in this locality.

In determining present cash value, you may also consider decreases in value of money that may be caused by future inflation.

INSTRUCTION NO. 15

A Plaintiff who sustains damage as a result of a defendant's breach of contract has a duty to minimize its loss. Iron Gate is not entitled to recover for any part of the loss that it could have avoided with reasonable efforts. Tapio Construction has the burden to prove Iron Gate's failure to use reasonable efforts to minimize its loss, and the amount of damages that could have been minimized or avoided.

INSTRUCTION NO. 16

An agent is a person employed under an express or implied agreement to perform services for another, called the principal, and who is subject to the principal's control or right to control the manner and means of performing the services. The agency agreement may be oral or in writing.

INSTRUCTION NO. 17

Any act or omission of an agent within the scope of his authority is the act or omission of the principal.

INSTRUCTION NO. 18

You must not discuss or speculate about whether any party has insurance or other coverage available. Whether a party does or does not have insurance has no bearing on any issue that you must decide. You are not to make, decline to make, increase, or decrease any award because you believe that a party does or does not have medical insurance, workers' compensation, liability insurance, or some other form of coverage.

JURY INSTRUCTION # 19

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict. Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to reach a verdict ten of you must agree. When ten of you have agreed, then the presiding juror will fill in the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with it. The presiding juror will then inform the bailiff that you have reached a verdict. The bailiff will conduct you back into this courtroom where the verdict will be announced.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

IRON GATE PARTNERS 5, L.L.C., Plaintiff, v. TAPIO CONSTRUCTION, INC. and R.T. WHARTON ASSOCIATES, INC., Defendants.	Case No. 11-2-01709-9 **JURY INSTRUCTIONS REQUESTED BY PLAINTIFF IRON GATE PARTNERS 5, L.L.C.**

Plaintiff Iron Gate Partners 5, LLC, ("Iron Gate") requests that the Court address to the jury the following approved Washington Pattern Jury Instructions and the Special Jury Instructions that follow, separately stated and consecutively numbered:

1. WPI 1.01: Advance Oral Instruction – Beginning of Proceedings
2. WPI 1.02: Conclusion of Trial – Introductory Instruction
3. WPI 1.03: Direct and Circumstantial Evidence
4. WPI 1.07: Corporations and Similar Parties
5. WPI 1.08: Concluding Instruction – For General Verdict Form
    a. WPI 45.01 General Verdict Forms – Single Plaintiff and Defendant (Form A)

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b. WPI 45.01 General Verdict Forms – Single Plaintiff and Defendant (Form B)

6. WPI 2.06: Witness Who Has Been Interviewed

7. WPI 2.10: Expert Testimony

8. WPI 2.14: View of Site is Not Evidence

9. WPI 6.01: Before Administering Oath on Voir Dire

10. WPI 6.02: Before Recesses

11. WPI 6.03: View – Before Visiting a Site

12. WPI 6.06: Exhibit Admitted for Illustrative Purposes

13. WPI 6.09: Use of Depositions

14. WPI 6.10: Use of Interrogatories of a Party

15. WPI 301.01: Contract Defined

16. Plaintiff's Proposal Special Jury Instruction 1

17. Plaintiff's Proposal Special Jury Instruction 2

18. Plaintiff's Proposal Special Jury Instruction 3

19. Plaintiff's Proposal Special Jury Instruction 4

20. Plaintiff's Proposal Special Jury Instruction 5

21. Plaintiff's Proposal Special Jury Instruction 6

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DATED this 25th day of April, 2014.

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NO. 47749-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IRON GATE PARTNERS 5, L.L.C.,

Appellant

v.

TAPIO CONSTRUCTION, INC. and R.T. WHARTON ASSOCIATES, INC.,

Respondents

ERRATA TO RESPONDENT'S BRIEF

Mary R. DeYoung, WSBA #16264
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1. Attached hereto as Appendix 1 are revised pp. 16, 32 and 39 of the Respondent's Brief. The Respondent's Brief was filed on April 27, 2016. At that time, Respondent was awaiting Supplemental Clerks Papers. The Supplemental Clerks Papers have now been received. The revised pp. 32 and 39 add the citations for the Supplemental Clerks Papers. The revised p. 16 corrects an inadvertent error noted by Respondent in the process of preparing the Errata herein (interlineated as required to maintain consistent pagination in the brief). Please substitute the attached pp. 16, 32, and 39 for pp. 16, 32, and 39 in the Respondent's Brief.

DATED this 16th day of May, 2016.

SOHA & LANG, P.S.

By: _____
Mary R. DeYoung WSBA # 16264
Jennifer P. Dinning, WSBA #38236
Attorneys for Respondent Tapio Construction, Inc.

DECLARATION OF SERVICE

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action; my business address is SOHA & LANG, PS, 1325 Fourth Avenue, Suite 2000, Seattle, WA 98101.

On May 18th, 2016, I served a true and correct copy of ERRATA TO RESPONDENT'S BRIEF (with attached **Declaration of Service**) on parties in this action as indicated:

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Counsel for Appellant Iron Gate

Executed on this 18th day of May, 2016, at Seattle, Washington.

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

s/Debbie Low
Debbie Low
Legal Secretary to Mary R. DeYoung

6A, 4/22/14, pp. 1469-1476) Iron Gate's experts also did not endeavor to eliminate non-construction defect causes of alleged damage.

For example, Iron Gate asserted that concrete spalling[5] shows that Tapio's work is defective and the cause of water intrusion. (RP, Vol. 6A, 4/22/14, p. 1490). However, Iron Gate's expert, Mr. Cross, testified that there were multiple possible causes for concrete spalling, and they made no effort to rule out other causes. (RP, Vol. 6A, 4/22/14, pp. 1490-1491, 1542; *see also* RP, Vol. 5A, 4/21/14, pp. 1160-1161) Mr. Cross also testified that he could not say that damage to the concrete at the project was actually caused by Tapio's work. (RP, Vol. 6A, 4/22/14, p.1490)

Iron Gate's expert Justin Franklin affirmatively testified that the level of vertical cracking in the concrete is related to the placement of the rebar in the concrete wall. (RP, Vol. 5A, 4/21/14, pp. 1143-1145; 1152-1153)

Mr. Franklin also testified that the rebar was placed according to the plans, but the plans themselves do not meet the applicable building code. (RP, Vol. 5A, 4/21/14, pp. 1149-1150) Further, Mr. Franklin testified that these types of errors could not be spotted by a concrete

[5] The term "spalling" refers to cracking or breaking of concrete. (RP, Vol. 6A, 4/22/14, pp. 1338-1339)

Credit Ass'n v. MacHugh, 90 Wn. App. 650, 654, 953 P.2d 812 (1998). Interpretation of a contract is a question of law only if the facts are undisputed and there is no extrinsic evidence on the issue. **Snohomish County Public Transp. Benefit Area Corp v. FirstGroup America, Inc.**, 173 Wn.2d 829, 834, 271 P.3d 850 (2012). Where summary judgment on contract interpretation cannot be had, "the jury must discern the parties' intent in order to interpret the contract." **Wm. Dickson Co. v. Pierce Cty.**, 128 Wn. App. 488, 494, 116 P.3d 409, 413 (2005).

As discussed below, the language of the parties' contract is subject to more than one reasonable interpretation, and there were questions of fact as to the parties' intent as expressed in their contract. Accordingly, the trial court correctly denied Iron Gate's motion for summary judgment and motion for directed verdict, and submitted the contract interpretation issue to the jury. (**See Appendix B**)[14] The jury's decision on the issue is reviewed based on the substantial evidence standard. **Cox v. Charles Wright Acad., Inc.**, 70 Wn.2d 173, 176-77, 422 P.2d 515, 518 (1967).

The language of the warranty is quoted above in its entirety at p. 9. In pertinent part, the warranty provides:

> Contractor warrants and guarantees to Owner (i) the satisfactory performance of the Work for period of one year from _____, the date of Completion . . . . Contractor

[14] CP 1142-1466, at 1453, Jury instruction #9.

adopted Iron Gate's formulation of this legal principle. (**See Appendix A**)[20]

Notwithstanding Iron Gate's proposed jury instruction, its position throughout this case has been that its claim for breach of the contractual warranty provision is assessed on a wholly different standard. Iron Gate's argument, in essence, is that it need not establish **any** type of causal link between the alleged breach of the warranty provision and resulting damages. (Opening Brief, p. 15)[21] Rather, Iron Gate's contention has been that the causation element of its breach of contract claim can be effectively inferred by the mere presence of water intrusion in the facility. However, Iron Gate has never cited any case law supporting the conclusion that *res ipsa loquitur*-type principles are properly applied to the causation element of a breach of contract claim. The trial court correctly construed the warranty provision to require a showing of causation to support a breach claim, correctly rejected Iron Gate's legal argument that its claim could be proved without establishing the causal link between the alleged breach and

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[19] CP 1408-1441, at 1434-1435, Iron Gate's Proposed Special Jury Instruction no. 1.

[20] CP 1442-1466, at 1455-1456, Final Jury Instruction #11.

[21] Iron Gate's opening brief argues: "The 'work' need not be defective per se as that implicates a different part of the warranty. Rather, Iron Gate was only required to show that the final product did not "perform" to Iron Gate's satisfaction. The flooding of brand new dry storage units means that the final project did not perform as envisioned by the parties, but particularly Iron Gate."